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GREETINGS TO THE RIGHT REVEREND RECTOR

THE JURIST takes great pleasure in extending its congratulations to Rt. Rev. Msgr. Patrick J. McCormick, Ph.D., newly appointed Rector of The Catholic University of America. It is grateful to him for the numerous courtesies of which it was the recipient from his generosity in the past and anticipates numerous opportunities in the future for a similar expression of appreciation of his bounty. No other attitude towards the future is possible to one who is aware of his deep personal interest in every activity of the University, and in this instance, in the University's cooperation in the project of widening the horizon of the Science of Canon Law. A profound scholar, alert to the fabulous rewards of scientific research, the newly appointed Rector can not but exert a stimulating influence on all devoted to the prosecution of scientific investigation in the canonical, as well as in all other fields. Impelled by his inspiration and support, THE JURIST confidently expects not merely to consolidate the gains already made but also to increase its capacity for service in its chosen field.

A LIGHT TO THE NATIONS

"Hearken unto me, O my people, and give ear to me, O my tribes: for a law shall go forth from me, and my judgment shall rest to be a light of the nations." Prophecy of Isaias, li:4.*

ON the evening of January 4, 1919 the spirits of Catholic Americans from coast to coast rejoiced with legitimate pride as they read of the visit of Woodrow Wilson, the twenty-eighth president of the United States, to Benedict XV, Vicar of Christ and two hundred and sixtieth successor of Peter the Fisherman. On this occasion, the American statesman's triumphal procession across Europe had reached a new and unprecedented splendor.

In the Vatican Palace where the leader from the New World was received with the medieval magnificence of the age-old papal court, there took place the momentous meeting of two men who during the long dark months of carnage and devastation had labored incessantly to find the road to peace and to restore order to a world which had been ravished by hatred and lawlessness.

But there was another incident which occurred on the occasion of this visit of President Wilson to the Vatican, which understandably received less publicity. And that was his visit to the Cardinal Secretary of State in fulfillment of the requirements of diplomatic protocol. As Woodrow Wilson and Pietro Gasparri exchanged formal courtesies, the venerable Cardinal who had worked with truly herculean efforts during all those months to implement the Pope's peace plan, founded on the norms of eternal justice; who had been snubbed and slighted and even slandered by

* Sermon delivered by Very Rev. James H. Griffiths, S.T.D., Vice Chancellor of the Diocese of Brooklyn, at the Pontifical Mass commemorating the Twenty-Fifth Anniversary of the Enactment of the Code of Canon Law, in the National Shrine of the Immaculate Conception, Washington, D. C., May 16, 1943.

European leaders for his pains—gazed into the steel blue eyes of the angular American idealist—and wondered!

Wilson was on his way back to Paris: back to the Conference of world leaders from which the Vicar of Christ, the unselfish exponent of true peace, had been shamefully excluded by a pact hatched in ignoble secrecy. Almost like an "Innocent Abroad" he was on his way back to Paris where this same Gasparri had lived and brilliantly taught law for over eighteen years; where Gasparri knew every cosmoplitan crossroad and every cross-current of international opinion and intrigue.

As the President rose to take his leave, the Cardinal Secretary placed in his hands a token—an ominous token, one might say—of his visit to the house of Peter the Fisherman. It was a book beautifully bound in white parchment, on the cover of which there gleamed in golden letters the title *Codex Iuris Canonici.*

Pietro Gasparri had indeed given Woodrow Wilson a significant gift to take back with him to the green baize tables of Paris and to the glittering Hall of Mirrors at Versailles. It was as though a father had given to him the son of his loins; as though Michelangelo had presented to him his "Last Judgment", as though Tschaikowsky had offered his "Symphonie Pathétique". As he delivered this Code which less than a year previously had become the official law of the entire Western Church, Pietro Gasparri had given his own masterpiece, over which he had labored with countless other churchmen, night and day, during peace and during war, for fourteen long years since that hour in 1904 when Pope Pius X had decreed the codification of Canon Law as an integral element in his sublime program to "restore all things in Christ". Indeed Van Hove says that Papa Sarto, the pious, the peasant, the parish priest Pope who had been providentially catapulted into the Papacy through the caesaropapistic meddlings of the Habsburgs, had enunciated to his familiars on the very night of his election his firm conviction that to restore ecclesiastical discipline in Christ it would be imperative to undertake

immediately a redaction of the multiple laws of the Church into a systematic, authentic, exclusive legal Code adapted to the divine mission of the Church in its modern ambient.

It was not to be a collection or even an official compilation, reproducing verbatim ancient legislation and arranging it in logical order. Nor was it to be a mere unification of existing ecclesiastical laws. For with due consideration for custom, this Code would abrogate all particular laws contrary to its content. It would be modelled on the unique legal structure bequeathed to civilization centuries before by the Emperor Justinian, but it would not be a stilted, static mimicry of antiquity.

In reports current at the time it was stated that Mr. Wilson had commented with admiration on the marvelous organic development in this new ecclesiastical legislation and had noted with discerning appreciation the elegantly concise canons, the succinct legal sanctions and the simple and dignified latinity eminently worthy of the sacred majesty of Roman Law.

As he made his way from the audience chambers through the courtyard of San Damaso and down to the Bronze Doors, Wilson, the historian, must have realized that he carried under his arm not merely a new legal code, aprioristically conceived and arbitrarily elaborated by a group of modern jurisconsults. All about him in those precincts were invisible witnesses to its complex historical and scientific heritage. In the shadow of the columns there was standing the regal spirit of another civil ruler, Charlemagne, who had come to Peter's House a thousand years before and had received from Hadrian the Pontiff the "Codex Proprius" of the Roman Church, compiled by Denys the Little from the fearlessly orthodox Conciliar legislation of ancient Eastern Christianity. Contemplating the modern American statesman was the cowled figure of a Benedictine monk: the spirit of Gratian whose *Decretum* had blazed the trail toward systematized legislation and had heralded the glorious juridical renaissance of the twelfth century. He it was who had inaugurated a movement which would bear fruit

in the following century in the Magna Charta of England and would thereafter undeniably influence all our modern laws, especially as they concern the fundamental rights of man. In every nook and corner hovered the spirits of those men of yore who had evolved the law of the Church and had enriched humanity with their legal genius, now absorbed into the new *Codex*. Here there appeared the pontifical form of Gregory IX and beside him the white-robed Dominican, Raymond of Penyafort, holding the five Books of the Decretals. There outlined stood the majestic silhouette of the double-crowned Boniface VIII who admits that he passed sleepless nights in planning his *Liber Sextus* to guarantee accuracy and security in ecclesiastical discipline. It was indeed a pageant of Popes with John XXII exhibiting the *Clementinae* and Gregory XIII pointing to the new *Corpus Iuris* and Benedict XIV displaying the *Bullarium*. Mingling with them were the less renowned but no less able pontiffs and prelates and clerics who had made possible the disciplinary reforms of the Council of Trent and had painstakingly elaborated the jurisprudence of the Church in the *Regulae* of the Apostolic Chancery and in the Decrees of the Sacred Congregations and Tribunals.

In very truth the American President was carrying with him in this compact volume the limpid, lucid distillation of nineteen hundred years of heroic pastoral solicitude, of unswerving infallible teaching, of delicate discerning government and of brilliant juridical genius. John Ruskin has remarked that Gothic architecture is frozen poetry. If this be admitted, then it is scarcely intemperate to declare that nearly every canon in the *Codex Iuris Canonici* is frozen history. In this monumental work all the ages of ecclesiastical history have given one another rendezvous. Here their various products may be seen all together; not confused but interfused; not heaped one upon another, as Livy had described Roman Law, but correlated and integrated into a reasonable organic whole for the sole purpose of attaining more effectively the common good of the Church of God.

But the chief purpose of the Church in codifying her law was not to focus the attention of the world on its glorious historical background. She was not playing the role of the archeologist or the antiquarian dilettante. The Church was not looking backward—she was principally looking forward. She was looking straight ahead at the supernatural goal of restoring all things in Christ. She was looking straight ahead into the eyes of the enemies who were threatening not only the flock of Peter but threatening as well the entire fabric of civilization. She was girding herself with adequate disciplinary legislation to meet the evergrowing challenge of Positivism and Naturalism and Agnosticism and Materialism. By the orderly codification of the legislation of centuries and by the independent promulgation of her law she was making it possible for the clergy and faithful to know the laws which they should obey and she was vindicating the role of lawgiver conferred on her by her Divine Founder when He said " Whatsoever you shall bind upon earth, shall be bound also in heaven; and whatsoever you shall loose upon earth, shall be loosed also in heaven." She was striking fearlessly at the canting Modernists who had denied her juridical personality; who had derived whatever puny power they had left her, not from the Christ, the eternal Lawgiver, but from that intangible factor, designated as the collective religious consciousness of the faithful. She was repudiating by vigorous, positive action and not merely by oral confutation, the totalitarian theories of those who were already teaching—and be it noted, not without applause—that all her rights and all her powers are derived solely from the deified State and that consequently all her ministerial, legislative, charitable and educational activities are circumscribed by and subject to the pleasure and whim of the civil power.

Like the householder in the Gospel parable she has brought forth from her treasure house a Code of law embodying new things and old. The old things emphasize her unique prudence and wisdom through the centuries and cur-

sorily suggest her mysterious powers of endurance. The new things call the attention of the world to her ever-resurgent vitality and her traditional readiness to meet new maladies with new remedies. To those false seers who prophesied her disintegration and doom when the breach was driven at Porta Pia and she was stripped of the trappings of temporal domain; to those who deplored her stubborn refusal to adapt her very dogmas to the intellectual fluctuations of the moment, who jubilantly declared that her condemnation of Modernism was punctuated by a death rattle, she held forth the most humiliating refutation in the form of a marvelously modern organic body of concise, unifying laws, admirably suited to the efficient, sanctifying government of her millions of modern adherents scattered over the face of the earth. Indeed, it would appear almost too obvious to observe that such firm, wise legislative dynamism is not readily recognized by humanity as characteristic of a corpse.

Then again, it is quite proper to recall that the Church courageously brought forth this masterpiece of her law-making genius, precisely at an hour when all mankind was convulsed by the most horrible catastrophe which history had thus far recorded. At a time when arrogant Nationalism had precipitated this universal desolation and was preparing the way for the more devastating blood myths and fantastic race fables, the Church alone had the fortitude to affirm practically her loyalty to the principle of the universal solidarity of the human race. She promulgated the Code of discipline which was so detailed that it actually told the individual Catholic what and when he might not eat, but which was at once so international, so supernational in its scope that it intimately affected the lives and *mores* not merely of a few million men in Western Europe but of more than 350 million human beings of every racial stock and nationality, of every social class and condition working out their individual salvation in the throbbing heart of the streamlined metropolis or on the pin points of tropical

islands which dot the ample bosom of the sea. This Code of laws represented in a sense her profession of faith in the universality of Christ's redemption; in the precious dignity, the eternal value of one human soul, no matter where it might be found. This Code was her answer to the dithyrambic ravings of the era regarding the Raubthier, the Superman, the man beyond good and evil. It was a practical confutation of the insane hypothesis of ethical relativism which pretended to differentiate the Slave Morality from the Master Morality. This Code, applied with equity and without discrimination to every Catholic of the Latin rite in every corner of the world, constituted her invincible refutation of those astute adversaries who sought to neutralize her magnificent redemptive efforts in the mission field by identifying her with odious imperialism and by charging her with the dissemination of an incompatible European cultural pattern and message.

And now after five and twenty years during which we Catholics of the world have lived under the ordered discipline of the Code, we might properly inquire as to the manner in which this juridical experiment of the Church has acquitted itself during the quarter century; whether this resurgence of juridical activity has made its anticipated contribution to the restoration of all things in Christ. This is a question which suggests itself to all of us this morning. But it is a question which may not be facilely answered. First of all, we are still standing so close to the masterpiece that we cannot properly appraise its grandiose proportions and tapering vistas. Since it has been in force somewhat less than a generation, we should realistically understand that it has barely begun to permeate the complex ecclesiastical structure and to radiate its white light throughout the Mystical Body. It has encountered the psychological impact of "nova et vetera" in the established mass of customs and practices, of decrees and resolutions which had grown up and become entrenched in the traditional ecclesiastical ambit during the long centuries since the last official compilation of law made its appearance.

But on the other hand though this new Code, the vehicle of the Church's juridical aspirations, has been in force for scarcely a generation, it has been submitted to a test such as no previous legal instrument of the Church has undergone. For it has been a generation during which humanity itself has been uprooted. For at least two centuries society sentimentally and externally preserved some of the old decencies salvaged from supernaturalism. But during this generation the sham was terminated and the issue was joined. The enemies of immutable Truth first began to oust God and the supernatural from the field of empirical science. In their laboratories they laid the foundations for the mercilessly efficient blitzkrieg which with the fiendish accuracy of a Dark Angel has seared and scorched and blackened the face of the earth. But, at its worst, all that godless natural science can do is to maim and cripple and ultimately destroy the life of the body. But the godless concept of justice and jurisprudence has proven a far more terrifying menace. For in the name of the even-handed goddess who holds the quivering scales, the godless jurist has blasphemously imposed the slavery of the spirit and has reduced Man, made in God's image and likeness, to the status of a brute animal stripped of personal dignity, bereft of basic rights and led by the halter of terrorism to feed at the trough of the "Benevolent State".

In nations and among peoples who have been the traditional exponents of the juridical order, the reign of law has been perverted, subverted and destroyed. In this regard, Pope Pius XII in his Christmas Allocution warned that "Outside the Church of Christ juridical positivism has reigned supreme, attributing a deceptive majesty to the enactment of purely human laws and effectuating the fatal divorce of law from morality." As civil codes have crumbled and the juridical order has been liquidated in the name of pseudo-mysticism and legalistic realism, the Church of God, which has so often been patronizingly identified with a smug static, mystical and unrealistic approach to the

problems of life, has labored serenely through her juridical norms in ordering practically the spirits of men to the attainment of true life, true liberty and the pursuit of true happiness. During this era of turmoil and tyranny when men have so frequently sought to attain their objectives through the bloody instrumentality of the purge and the *putsch*, she has welded her far-flung organism into a marvelous unity through spiritual media and through the orderly process of law. While secular jurists, infected with the virus of naturalism, have striven futilely to isolate the ultimate determinant of justice either in "a sentiment of fairness" or in "the decent fulfillment of decent expectations" or in "the satisfactoriness of a thing to all socially tolerable persons", the Church of Christ has fearlessly thundered against this perilous subjectivism and has heroically maintained the necessity of a divine sanction for law. In a relentless *argumentum ad hominem* she has reminded the statesmen and jurists that if there be no God to avenge justice; if the Ten Commandments are to be ridiculed as a collection of Hebrew taboos; if the Sermon on the Mount constitutes no positive, eternally true norm of justice; if the whole New Testament is but the visionary preachments of the effeminate Apostles of a pallid Christ—then might is right and Hitler is right and Communism is right and the purge is right and the concentration camp is right and sterlization and economic enslavement — all the abominations of totalitarianism are right — and democracy is an unrealistic farce.

While she has ever been the Palladium of law and order, during these last twenty-five years the Church has remained stanchly faithful to her guardianship of Law. Within her schools and universities, within her administrative offices, in the rank and file of her ministers, there has dawned a glorious renaissance of juridical activity. Through the codification of her law, the study of Canon Law and all law has received a new impetus, and interest in the law has percolated down through the masses of her organism. And yet one is constrained to confess with regret that within the

very household of the faith there have been occasional figures who looked with misgivings on this quarter century of intense legal development in the Church. Some of them have labeled it a period of sterile juridicism which is alleged to have dried up the well springs of piety and devotion and asceticism; to have mechanistically centralized and bureaucratically devitalized fervent Christian life and practice. Others have gone so far as to cry out that the Code and legalism have become fetiches. One's prime impulse is to inquire whether these are the same persons who before the promulgation of the Code, expressed contempt for Canon Law because of its tortuous labyrinth of unrelated decrees and decretals and compilations and *extravagantes*. But history will bear unprejudiced testimony to the fact that in every age when the disciplinary law of the Church has been clearly enunciated and equitably administered, even in circumscribed spheres, the deep spiritual life of the Church has been correlatively enriched. There is nothing mysterious about this. It stands to reason. For if order is heaven's first law; if the glorious populace of the celestial Jerusalem bow down in adoration before the eternal order contemplated in the Beatific Vision, then order which in this world is achieved only by law must of necessity constitute a primary requisite for the more effective fulfillment of the sanctifying program of Christ's earthly Kingdom.

This morning as we are gathered here in the national Capital with the glad tidings of desert victory still ringing in our ears, our hearts are yearning for the ultimate victory which will bring peace to all the world. If it is to be a lasting peace, it must be the Peace of God. If it is to be a lasting peace, it must be the tranquillity of order. And there can be no international or national order, no social or economic order unless the leaders of men reestablish the juridical order. All the blood and sweat and tears will have been shed in vain, unless the victorious architects will raise the Temple of the Four Freedoms on the infrangible cornerstone of God's Eternal Law.

Deo Gratias!

THE INTERPRETATION OF INVALIDATING LAWS *

SEVERAL questions should be investigated in a study of the interpretation of invalidating laws. The law of the Code in canon 11 is the substance of the common opinion held for several centuries. This law excludes the effect of invalidity from any law unless an invalidating word or clause expressly or equivalently states this effect.[1] But this is only one of the questions to be investigated in the study of the interpretation of invalidating laws. Nor is the law in canon 11 of The Code of Canon Law the original interpretation of a prohibitory law. How the force of a prohibitory law came in time to be reduced frequently to a mere prohibition without any invalidating effect is in itself an interesting study and will be pursued from the enactments of Theodosius II and Justinian to the present law of the Code.

Another question to be investigated is the scope of the word "*aequivalenter*" in canon 11 of The Code of Canon Law. There are laws which declare an act invalid in terms equivalent to the actual meaning of the word "*expresse*". There are other laws which demand certain formalities or solemnities without which an act is invalid. These formalities or solemnities are by several canonists held to be the real force of the word "*aequivalenter*" in canon 11, of The Code of Canon Law.[2]

A third question to be investigated is the study of the presumption which supports the application of canon 11 of The Code of Canon Law. Many invalidating laws are

*This is the third in a series of articles on invalidating laws. The first two appeared in nn. 1 & 2 of this volume of The Jurist.

[1] "....actum esse nullum aut inhabilem esse personam expresse vel aequivalenter statuitur."

[2] E. g., Cance, *Le Code de Droit Canonique*, p. 48; Cocchi, *Commentarium in Codicem Iuris Canonici*, vol. I, pp. 88-89.

based on the danger of fraud. If this is a general presumption, the law would be applicable even though no actual fraud existed.[3] On the other hand, if this is not a general presumption, the law would be inapplicable whenever fraud did not exist. It is important to know the presumption upon which the legislator bases his law. No correct interpretation of a law can be had without a serious study of the presumptions of law and fact which influence a legislator in his enactments.

Canon Law to some extent was influenced by Roman Law. This is apparent in many instances, but it is notably so in invalidating laws.[4] Consequently, it is to the Roman law that one's attention will first be directed to study the relationship between a prohibitory law and its effect. The important texts of Roman Law to be studied have already been mentioned and briefly examined in the discussion on the nature of an invalidating law. These texts are the laws of Theodosius II and Justinian. The latter text is the one which is usually cited in the study of the interpretation of invalidating laws. Another text in the Code of Justinian can be and at times is cited to prove the effect of an invalidating law. This text is much shorter and it has the conciseness of a rule of law.[5]

The text of Theodosius II will be examined first. Some unavoidable repetition will be found as the discussion of the interpretation of the law of Theodosius II will necessarily involve some mention of its nature. The text:

> Non dubium est in legem committere eum, qui verba legis amplexus contra legis nititur voluntatem. Nec poenas insertas legibus evitabit, qui se contra iuris sententias scaeva praerogativa verborum fraudulenter excusat.

[3] C. 21. Leges latae ad praecavendum periculum generale urgent etiamsi in casu peculiari periculum non adsit.

[4] E. g., law of moral persons, procedural formalities, testaments, etc.

[5] C. II, 3, 6. Pacta, quae contra leges constitutionesque vel contra bonos mores fiunt, nullam vim habere indubitati iuris est."

1. Curiales ne ad procurationem rerum alienorum accederent, cautum est providentissima sanctione, cuius in fraudem conducendi eos sibimet usupare licentiam, sublimitatis tuae suggestione comperimus. Quos licet pristinae legis laqueis irretiri cernamus (conductionem namque speciem esse procurationis certissimum est) attamen ne fraudis suae velamine leges lateant contemptores, neve eis fucata suae callidatis excusatio relinquatur, hac perpetuo lege valitura sancimus, conducendi quoque fundos alienos licentiam curialibus amputari, locatos res fisci viribus vindicari. 2. Conductor itaque locatori, vel locator conductori contra hanc legem nulla tenebitur actione. Nullum enim pactum, nullam conventionem, nullum contractum inter eos videri volumus subsecutum, qui contrahunt lege contrahere prohibente. 3. Quod ad omnes etiam legum interpretationes, tam veteres quam novellas trahi generaliter imperamus, ut legislatori, quod fieri non vult, tantum prohibuisse sufficiat, cetera quasi expressa ex legis liceat voluntate colligere: hoc est ut ea quae lege fieri prohibentur, si fuerint facta, non solum inutilia sed pro infectis etiam habeantur, licet legislator fieri prohibuisset tantum, nec specialiter dixerit, inutile debere esse, quod factum est. Sed et si quid subsecutum ex eo vel ob id, quod interdicente factum est lege, illud quoque cassum atque inutile esse praecipimus.[6]

The introductory part of this text of the law of Theodosius II states that there is no doubt that the law is broken if the spirit of the law is disobeyed while its letter is adhered to. Such disobedience to the law itself will entail punishment. These few lines of the text of the law of Theodosius II state a principle of law which scarcely needs explanation. It is an excoriation of fraud. Such fraud is to be punished. Nothing regarding the interpretation of invalidating laws is indeed immediately found in this part of the law of Theodosius II. This part of the law can indeed be considered as introducing the specific instance which moved Theodosius II to enact his law. It is useful to see according to what principles of law he would judge the case presented for his

[6] *Novellae Constitutiones Imperatorum* (Romae, 1844), tit. IX, *Ne curialis praedium alterius conducat aut fideiussor conductoris existat.*

decision. These lines can also be cited as supporting the penal nature of invalidating laws because they do fulminate against fraud and indicate that fraud is to be punished. Whether the actual substance of the law is therefore penal in nature has been discussed in an earlier article. It need not be repeated here.

Paragraph 1 of the law of Theodosius II is a statement of a law which controlled the actions of the members of the curia (*curiales*). This paragraph also contains a narration of the method used to circumvent this law. The immediate judgment of Theodosius is likewise included.[7]

Paragraph 2 has two separate subjects. The first subject is a statement that no action is at hand for either party who contracted contrary to the existing law. Specific reference is made to the infraction of the law mentioned in the first paragraph. The other subject of the second paragraph of the law of Theodosius II is a statement of the fundamental principle of law that no agreement or contract can exist if the law forbids it. This latter statement is important. It states the legal effect of a prohibitory law. Here is found the very substance of the law of Theodosius II. Later, he extends the application of his law, but in the statement "*nullum enim pactum etc.*", Theodosius II clearly and definitely and unequivocally states the force of a prohibitory law. This force is to invalidate any agreement or contract entered into contrary to law. How Theodosius II was led to state this effect of a prohibitory law or what abuse influenced him to make such an enactment is really immaterial. Even if it be maintained that the punishment of fraud is intended in the application of this law, it is to include fraud within the scope of this law rather than to construct a new law applicable only to fraud.

It should be clear, then, that according to Theodosius II any agreement or contract contrary to law is invalid. So far no provision is made regarding the necessity or non-

7 "*...hac perpetuo lege valitura sancimus, conducendi quoque fundos alienos licentiam curialibus amputari. etc.*"

necessity of an invalidating clause in a prohibitory law. Judged by the law of Theodosius II, the opposition of the law itself to an agreement or contract is sufficient to invalidate it.

Theodosius II did not conclude his enactment with a judgment on the specific case presented to him. On the contrary, he proceeded to legislate further. This extension of his law and his own interpretation follow.

Paragraph 3 of the law of Theodosius II contains two new subjects and repeats one subject already mentioned. The first new subject is an extension of the principle that a prohibitory law invalidates an act contrary to it to every interpretation of law whether old or new.[8] The second new subject is the statement that no specific clause is required in the prohibitory law in order that an act contrary to it be invalid.[9] These two new ideas in the law of Theodosius II considerably add to the understanding of the force of a prohibitory law. Later in Canon Law a distinction would be made between the prohibition of an act and its invalidation. This distinction is not recognized by Theodosius II. For him it was sufficient for invalidity if the legislator prohibited an act.

It cannot be denied that the law of Theodosius II is rigid. However, it must be kept in mind that when a legislator prohibits an act, he does not want that act performed. Everyone knows the fundamental difference between prohibiting an act and invalidating it. Theodosius II likewise knew this difference, but he none the less stated that a specific invalidating clause in a prohibitory law was unnecessary.

At the same time, it must be remembered that Theodosius II was only one legislator, to be followed of course by Justinian, who interpreted his own law as not requiring a specific invalidating clause. Other legislators could be

[8] *"Quod ad omnes legum interpretationes tam veteres quam novellas, etc."*

[9] *"... tantum prohibuisse sufficiat ... licet legislator fieri prohibuisset tantum, nec specialiter dixerit, inutile debere esse, quod factum est."*

adduced to mitigate the rigidity of the law of Theodosius II. These legislators could say that they did not intend to invalidate an act unless they specifically stated this effect of a prohibitory law. Custom, likewise, could mitigate the force of a prohibitory law so that a specific invalidating clause would be required. Theodosius II, of course, had no real power over his successors, nor could he determine the actual force of prohibitory laws in Canon Law. While it is true that Theodosius II was competent to state what he intended by his own law, his enactment would always remain his own, and it need not be adopted entirely by his successors or used as a principle of law by the legislators in Canon Law.

Concluding his law, Theodosius II repeats his earlier statement than an act contrary to a prohibitory law is invalid. Nothing more need be said about this statement as it has been sufficiently discussed above. All that is necessary here is to establish that according to Theodosius II a prohibitory law invalidated contrary acts.

While the law of Theodosius II is the source from which Justinian drew his own enactment to state the force of prohibitory laws, it is the latter's law which is usually studied and investigated. Comparisons at times are made between the two laws, but usually Justinian's is considered sufficient to show the force of a prohibitory law in Roman Law.[10] Justinian's law follows.

> Non dubium est in legem committere eum, qui verba legis amplexus contra legis nititur voluntatem: nec poenas insertas legibus evitabit, qui se contra iuris sententiam scaeva praerogativa verborum fradulenter excusat. Nullum enim pactum, nullam conventionem, nullum contractum inter eos videri volumus subsecutum, qui contrahunt lege contrahere prohibente. Quod ad omnes etiam legum interpretationes tam veteres quam novellas trahi generaliter imperamus, ut legislatori, quod fieri non

[10] Suarez, for instance, considers Justinian's law a compendium of the law of Theodosius II. Cf. *Tractatus de Legibus ac Deo Legislatore,* lib. V, cap. XXVIII, nn. 2, 5.

> vult, tantum prohibuisse sufficiat, cetera quasi expressa ex legis liceat voluntate colligere: hoc est ut ea quae lege fieri prohibentur, si fuerint facta, non solum inutilia, sed pro infectis etiam habeantur, licet legislator fieri prohibuisset tantum nec specialiter dixerit inutile esse debere quod factum est, sed et si quid fuerit subsecutum ex eo vel ob id, quod interdicente lege factum est, illud quoque cassum atque inutile esse praecipimus. Secundum praedictam itaque regulam quam ubique servari factum lege prohibente censuimus, certum est nec stipulationem eiusmodi tenere nec mandatum illius est momenti nec sacramentum admitti.[11]

The importance of Justinian's law is that it immediately states a principle of law. It does not state the occasion which perhaps induced Justinian to reaffirm the law of Theodosius II. The law must, therefore, be taken as an expression of the will of Justinian in regard to every agreement or contract entered into contrary to the law. The same introductory sentence is found both in the law of Justinian and in the law of Theodosius II. From this it might be concluded that both laws were penal in nature, but this conclusion is subject to the criticism mentioned in an earlier article. Nor is the nature of the law of great importance at this time. All that need be established is whether a prohibitory law under Justinian had the same invalidating effect that it had under Theodosius II.

A comparison of the two laws shows that the will of Justinian coincided with the will of Theodosius II. Therefore everything that can be said of the force of a prohibitory law under Theodosius II must be said equally of the force of a prohibitory law under Justinian. Nor can it be said correctly that only fraudulent actions are contemplated by the law of Justinian. Rather, should it be said with Suarez [12] that the principle underlying prohibitory laws had been extended to acts perpetrated by fraud. The same all-inclusive invalidating force of the law of Justinian is equally

[11] C. I, 14, 5.

[12] *O. c.*, lib. V, cap. XXVIII, n. 4.

maintained by Bartolus.[13] Bartolus' doctrine on the force of a prohibitory law can be given in a few words. A contract contrary to the law is invalid: anything contrary to the law is worthless; where the law prohibits an act, the act is invalid even though nothing further be said about it. So firm is the contention of Bartolus that he demands a specific clause upholding the validity of an act performed contrary to the law if such an act is to be considered valid.[14] Strykius is equally certain of the immediate invalidating force of a prohibitory law. He says that anything contrary to the law is null.[15]

Barbosa's [16] commentary on the law of Justinian is important, for he not only demands that a prohibitory law contain a clause supporting the validity of a contrary act, but he expressly states that every prohibitory law has a tacit clause invalidating contrary acts.[17] This latter idea is an excellent paraphrase of the clause used by Justinian in determining the effect of a prohibitory law.[18] The words of Justinian should be clear enough to prove the invalidating effect of a prohibitory law, but Barbosa shows why such a law must produce such an effect.

Barbosa's commentary is likewise important for its clear explanation of the phrase "*non solum inutilia*" in the law of Justinian. He says an act contrary to the law is not only null and worthless but it is to be considered as if it had never existed.[19]

[13] *Commentaria* (Venetiis, 1590), Lib. I Codicis Justiniani ad tit. XIV, nn. 1-3.

[14] "Quando aut lex procedit affirmando et valet ... aut lex procedit ultra dando modum infirmandi et infirmabit illo modo." *Opera Omnia*, n. 21.

[15] *Opera Omnia* (Frankfurti et Lipsiae, 1743), v. XI, disp. XXVII, cap. II, n. 68: "Omne quod contra leges est, nullum est."

[16] *Collectanea ex doctoribus tum priscis tum neotericis in Codicem Justiniani*, (Lugduni, 1657), *ad legem "non dubium"*, pp. 128-129.

[17] "Notetur ad hoc ["prohibuisse sufficiat"] quod omnis lex habet tacitam clausulam decreti irritantis circa actum contrarium."—p. 129.

[18] "*... ut legislatori, quod fieri non vult, tantum prohibuisse sufficiat.*"

[19] "Non solum nullus est et inutilis, sed etiam habetur pro non facto et sic ipso iure nullus est."—*o. c.*, p. 129.

Biner [20] considers the law of Justinian only in relation to the effect of invalidating laws in Canon Law. After mentioning that in Canon Law a prohibitory law need not necessarily invalidate a contrary act, Biner admits that the law of Justinian offers a serious difficulty to such in interpretation. He does not cut himself free from a necessary dependence on Roman Law as Leurenius does [21] because of the citation of the law of Justinian in the decree of Gratian.[22] Consequently, Biner is at pains to compare the force of prohibitory laws in Roman Law and prohibitory and invalidating laws in Canon Law. Almost all of his argument can be omitted since Biner admits there is a difference between the force of a prohibitory law in Roman Law and its counterpart in Canon Law. Biner says it is the will of Justinian to invalidate when he prohibits an act.[23]

Suarez has a complete discussion on the law of Justinian.[24] Suarez feels that the law of Justinian is clear and unmistakable. In the introduction to his commentary on this law Suarez says that a prohibitory law invalidates a contrary act. This is true even though no invalidating clause is attached to the law.[25]

The discussion of Suarez is more concerned with a specious objection to the usual interpretation of the law of Justinian and with the time when the effect of a prohibitory law occurs. He likewise considers the force of custom derogating from Justinian's law. Only the objection to the usual interpretation of Justinian's law need be considered here.

[20] *Apparatus Eruditionis ad Jurisprudentiam* (Bononiae, 1754), pars. I, cap. II, p. 33.

[21] *Ius Canonicum Universum*, Lib. I, tit. II, p. 133.

[22] C. 13, C. XXV, q. 2.

[23] "Ergo vi huius legis, nisi aliunde constet, quod legislator voluerit tantum prohibere et non irritare, censendum est, eum prohibendo, simul velle irritare."

[24] *O. c.*, lib. V, cap. XXVIII.

[25] *O. c.*, lib. V, cap. XXVIII, n. 1.

The objection considered by Suarez [26] maintained that the law of Justinian merely punished fraudulent actions. It did not invalidate acts performed contrary to the law in good faith. This objection was said to be supported by the first part of the text of the law of Justinian,[27] coupled with the extension of the law to include " interpretations " of law rather than the laws themselves.[28] Thus, Justinian's law could be used to invalidate every act contrary to law, if this act were performed through fraud. Otherwise an act contrary to the law would not be invalid. Confirmatory argument was obtained by the assertion that Theodosius II merely meant to punish fraud.

Suarez denies the validity of this objection by showing that it is contrary to the intention of the legislator and contrary to the actual text of the law. He admits a specious validity which disappears upon investigation. The reply of Suarez to the objection concerning the scope of Justinian's law correctly analyses the intention and the will of Justinian. The same reply meets the confirmatory argument found in the law of Theodosius II.

Suarez maintains correctly that the law of Justinian is based on the law of Theodosius II. The latter law was undoubtedly enacted because of some abuse. But Theodosius II did not stop with penalizing abuses. He enacted a law which controlled all acts contrary to his law so that at least after Theodosius II fraud and open violation of the law were equally punished with invalidity.[29] Suarez shows that this is the only reasonable interpretation of the sentence beginning with the words " nullum enim pactum ". Suarez then continues his argument showing that Justinian thus

[26] *O. c.*, lib. V, cap. XXVIII, nn. 2, 3.

[27] "*Non dubium est in legem committere eum, qui verba legis amplexus, contra legis nititur voluntatem.*"

[28] "*Et ideo inquit non dixisse imperatorem: Quod ad omnes leges trahi imperamus, sed dixisse: Quod ad omnes etiam legum interpretationes trahi generaliter imperamus.*"

[29] *O. c.*, lib. V, cap. XXVIII, n. 3.

understood the mind of Theodosius II. This argument is based on the fact that Justinian omitted mentioning the abuse against which Theodosius II ruled but immediately after stigmatizing fraud proceeded to enact a law controlling every act contrary to his law. Thus not only fraud but also violations in good faith were subject to invalidity. Suarez does not mention contrary acts in good faith, but he must necessarily include them as violations of law. The principle of law found in the text of Theodosius II and Justinian will also apply to non-malicious violations of the law since merely the non-compliance with the law results in invalidity. In this matter, Suarez is inconsistent. He says that all violations of the law and not only fraudulent violations are included under the law of Justinian; yet he maintains later that this law is penal in nature.[30] A violation of the law in good faith would certainly be maintained by Suarez as an invalid act.

To the part of the objection which asserted that Justinian extended his law to interpretations of other laws rather than to the laws themselves, Suarez maintained that such objection is overruled by another sentence of Justinian's law.[31] Suarez's position is in accord with the progressive enactment found in the law of Justinian. Taken by itself, retroactive force is granted to the interpretations of old law and equal force is conceded to new law. But, Justinian did not stop with this sentence. He continued by stating that it is sufficient to prohibit when the legislator does not want the act performed. This shows clearly that any prohibition is enough to invalidate an act.

Leurenius [32] also considered the law of Justinian. This consideration was made more from the viewpoint of Canon Law than as a study of the law itself. However, Leurenius does offer some comment on the law of Justinian, and he concedes that acts contrary to a prohibitory law are invalid.

[30] Cf. *o. c.*, lib. V, cap. XXVIII, n. 13.

[31] "*Ut legis latori, quod fieri non vult, tantum prohibuisse sufficiat.*"

[32] *O. c.*, lib. I, tit. II, q. 133.

To Leurenius violations of law are to be punished. The only violations he contemplates are malicious violations. Hence, he says even if an act is said to be null in law this invalidity must await the judgment of the court.[33] The decision is retroactive. Leurenius does not consider the possibility of a violation of the law in good faith. Consequently, he must weigh every invalidity as a penalty. He could, then, say a declaration of crime is necessary before invalidity can be ascertained.[34] Leurenius took too narrow a view of invalidating laws, but, if his interpretation of the law of Justinian is correct, his conclusion must be admitted. However, as was determined earlier,[35] an invalidating law is not necessarily penal in nature.

The invalidity of an act contrary to a prohibitory law is likewise asserted in Canon Law. It must, however, be admitted that canonical jurisprudence is not clear in actually determining the effect of a prohibitory law. There are indications that a prohibitory law in Canon Law invalidated a contrary act, while other indications exist which deny such an effect.

For the invalidity of an act contrary to a prohibitory law is offered a text of a letter of Pope Gregory I: "*Imperiali constitutione aperte sancitum est, ut ea quae contra leges fiunt, non solum inutilia, sed etiam pro infectis habenda sint.*"[36] Another text offered is a Rule of Law of Pope Boniface VIII: "*Quae contra ius fiunt debent utique pro infectis haberi.*"[37]

These two texts are obviously based on the law of Justinian and said to represent an adoption of Roman Law by

[33] "Sic saepe actus dicitur nullus, non quia revera nullus est ipso iure, sed quia ope exceptionis et sententiae a judice latae fieri nullus debet a puncto in quo factus, casu quo capax sit huius irritationis et poenae."

[34] "Si quae irritatio ipso facto in ea lege contenta, cum sit irritatio poenalis, expectanda declaratio criminis, non secus ac in aliis poenis ipso iure impositis."

[35] Cf. The Jurist, III (1943), p. 39.

[36] C. 13, C. XXV, q. 2.

[37] R. J. 64 in VI°.

Canon Law. It is little wonder, then, that commentators who were greatly influenced by Roman Law should interpret the above texts as indicating that any act contrary to a prohibitory law is invalid.

The text of Pope Gregory I is admittedly a statement of the law of Justinian. But, as Suarez proves,[38] it is only this and not an incorporation of Justinian's law into Canon Law. Pope Gregory I is citing a civil law to solve a civil problem. This problem concerned a testament of an abbess. The Pontiff declared against validity in civil law. There is no real indication that Pope Gregory I had adopted the civil law into Canon Law.

But if the text of Pope Gregory I can be understood readily, the same ease is not found in Rule 64 of Pope Boniface VIII. This rule was published with the decretals of Pope Boniface VIII and was cited in ecclesiastical courts. Consequently, we can expect to find definite opinions in regard to the application of this rule of law.

Peckius,[39] for instance, takes a decided stand in favor of the invalidity of any act contrary to law. He is bound to admit that certain acts contrary to law are recognized as valid,[40] but he affirms that such acts should not be so recognized. Peckius says the law never acts in vain.[41] Peckius offers a number of observations indicating that he believes that a prohibitory law is always operative for the invalidity of contrary acts. He likewise is insistent that every act that does not fulfill the solemnities required by law is invalid. Further, he maintains that anything contrary to the mind of the legislator or any decision contrary to precedent is invalid.[42] Peckius also considers the possible necessity

[38] *O. c.*, lib. V, cap. XXIX, n. 3.

[39] *Opera Omnia, De Regulis Juris* (Antverpiae, 1666), Reg. 64.

[40] E. g., marriage with simple vows of chastity, Reg. 64, n. 10.

[41] *O. c.: lex nihil frustra agit*—n. 13.

[42] "Contra ius fiunt: (1) ea quae fiunt contra iuris formam; (2) quae menti legislatoris resistunt; (3) ea sententia quae contra solitum judiciorum ordinem proferatur"—n. 1.

for a specific clause invalidating an act. He decides that such a clause is altogether unnecessary since every prohibitory law implicitly contains this clause.[43] This is the same opinion Barbosa held in regard to the law of Justinian.[44]

The doctrine of Peckius is undoubtedly severe and rigid, and it was not followed by other canonists. Barbosa, however, while not commenting directly on Rule 64 of Pope Boniface VIII is inclined to agree with Peckius. He states his opinion relying on a decretal of Pope Boniface VIII [45] in which the Pontiff annuls every act performed after a reservation had been placed on a Cathedral benefice. This law contained an invalidating clause.[46] Barbosa uses this decretal in his explanation of the clause "*decretum irritans*".[47] In his commentary on this clause, Barbosa states that it has the effect of invalidating any act contrary to it. He further states that even acts in good faith are included.

It is tempting to associate Barbosa with Peckius in maintaining that every act contrary to a prohibitory law is invalid. The doctrine of Peckius is clear and not open to misinterpretation, but Barbosa's doctrine must be deduced from the fact that he cited the decretal of Pope Boniface VIII as supporting his doctrine. This decretal of Boniface VIII is not merely a prohibitory law. It is an invalidating law.

With the principal exception of Peckius, most commentators in Canon Law rejected the notion that a prohibitory law necessarily invalidated a contrary act. A specific invalidating clause was required in the prohibitory law before

[43] "Quando lex vel statutum prohibet fieri actum vel contractum, licet non procedat ultra annullando, tamen est actus nullus, quia lex prohibitiva simpliciter loquens, semper censetur habere clausulam annullativam actus et ita non est necesse, quod lex ultra annullet."

[44] *O. c.*, p. 129.

[45] C. 45, *de electione et electi potestate*, V, 6 in VI°.

[46] "*...inhibentes, ne ...et decernentes, si secus super hoc a quodam scienter vel ignoranter attentatum exstiterit, irritum et inane.*"

[47] *Tractatus Varii*, IV *de clausulis usufrequentioribus*, clausula XL # 2.

it could produce this effect. This contention did not include laws, e. g., testaments, which demanded special formalities or solemnities. These solemnities were in many instances reduced to conditions which had to be fulfilled before an act would be recognized in law as valid. Strykius, for instance,[48] maintained that even a slight defect of form would invalidate an act.

Pichler has perhaps the clearest statement relative to the force of a prohibitory law in Canon Law. He says an act contrary to a prohibitory law which does not contain an invalidating clause is illicit but not invalid.[49] The arguments that Pichler uses are generally the arguments proposed by all who hold the same opinion and are the same arguments which defend the present law in the Code. A review of these arguments will show how in Canon Law the interpretation of the force of a prohibitory law diverged from the interpretation of the same kind of law in Roman Law.

Pichler offers these arguments to support his contention. The first argument is based on a decretal of Pope Innocent III; the second argument rests on the different meaning of the verbs "*prohibere*" and "*irritare*"; the third argument is based on a Rule of Law.

Naturally, the strongest argument Pichler could advance is the doctrine of Pope Innocent III. The doctrine is found in a letter of Pope Innocent III to the Archbishop of Pisa.[50] In his letter, the Pontiff discusses the law regarding the time when monastic profession should be made. He says this profession should not be made before the proper time for probation has elapsed, but it is a valid profession if it were made before this time had elapsed. The case, then, resolved

[48] *O. c.*, Vol. I, disp. VIII, cap IV, n. 37: "Defectus formae, quantumvis modicus, actum reddit ipso iure invalidum."

[49] "Quando lex simpliciter prohibet aliquem actum et non addit clausulam irritantem, actus legi contrarius non est irritus sed tantum illicitus"—*Candidatus Jurisprudentiae* (Augustanae, 1733), v. I, tit. II, *de constitutionibus*, n. 70.

[50] C 16, X, *de regularibus et transeuntibus ad religionem*, III, 31.

itself into a violation of a prohibitory law. Profession was forbidden before a specified time for probation had elapsed. Pope Innocent III considered the violation of the law as actual, but he none the less declared the profession to be valid. The reason he assigned is the foundation for the doctrine that a prohibitory law in Canon Law does not necessarily invalidate a contrary act. Pope Innocent said: "*multa fieri prohibentur, quae, si facta fuerint, obtinent roboris firmitatem.*"

The decision of Pope Innocent III is important not only because it clearly departs from the Roman Law on the effect of prohibitory laws but also because it antedates Rule 64 of Pope Boniface VIII which is the principal argument for the doctrine of Peckius.

Pope Innocent III did not assign his reason for the validity of the monastic profession as something which he himself had introduced. Rather, he introduces this reason in a subordinate clause as something which was generally known. It is necessary to keep this in mind for all too frequently Canon Law jurisprudence is assumed to depend entirely on Roman Law. It is equally necessary to keep separate the developing jurisprudence of Canon Law and the continual thread of Roman Law influence on Canon Law. A comparison of this decretal of Pope Innocent III with Rule 64 of Pope Boniface VIII shows that the former Pontiff is demonstrating the independence of Canon Law while the latter Pontiff is adopting in Canon Law the jurisprudence of Roman Law.

Pichler's second argument shows the difference between the verbs "*prohibere*" and "*irritare*". This argument has validity only if the legislator has not determined what he meant by "*prohibere*". In Canon Law, as Pichler correctly infers, the significance of these verbs must be taken from the dictionary since the ecclesiastical legislator has not determined a broader meaning for the verb "*prohibere*". This argument, of course, could not be used in Roman Law, for Justinian said he intended to invalidate when he prohib-

ited an act.[51] In interpretation, it is entirely proper to use the ordinary meaning of a word when its significance is not extended or restricted. Consequently, Pichler cannot be accused of quibbling.

The third argument of Pichler follows from a consideration of his second argument. To invalidate is graver than to prohibit. Using, then, the invalidation of an act as an effect more grave than mere prohibition, Pichler employs Rule 15 of the Rules of Law of Pope Boniface VIII to show that invalidation should be restricted and not used interchangeably with prohibition.[52] This is a valid argument, for everything that is repugnant to the validity of an act should be demonstrated and not assumed. If an act is valid in natural law it can still be invalid in positive law but such restriction is not to be assumed. It must be demonstrated. If, then, invalidation is considered as a greater restriction on one's natural right to act than would be a mere prohibition to act, such invalidation is far more odious. It should, then, be restricted. In other words, whenever invalidation of an act actually occurs, it must be demonstrated as something more than an illicit act.

Besides offering argument for his own opinion, Pichler considers in detail the arguments suggested for the opinion that even in Canon Law a prohibitory law invalidates a contrary act. These arguments are set down by Pichler and answered by him.

The first objection considered by Pichler rests on the laws of Justinian.[53] Pichler answers this objection by maintaining that these laws are primarily to restrain acts contrary to good morals. Such acts should be punished with invalidity. Thus Pichler hints that he considers the laws of Justinian as penal laws.

The second objection is founded on the necessary subordination of the will of the subject to the will of the legislator.

[51] "*... tantum prohibuisse sufficiat.*"

[52] "*Odia restringi, et favores convenit ampliari*"—R. J. 15 in VI°.

[53] *Non dubium,* C. I, 14, 5; *pacta quae,* C. II, 3, 6.

No time need be spent on proving this necessity. Pichler, however, claims there is no lack of subordination if the legislator does not sufficiently indicate his will. In Canon Law the will of the legislator to invalidate when he only prohibited is not clear; therefore Pichler will apply a principle of law [54] and maintain that the prohibition of an act is not necessarily its invalidation.

The third objection is fundamentally of moral character. It is stated that one should not profit by an evil act. As a moral principle, Pichler could admit this objection, but as a legal principle he was obliged to refute it. He does so by maintaining that some acts are recognized as valid even though they are forbidden. The examples he uses are from theology, e. g., the consecration of the host and the remission of sins by an unworthy priest.

The fourth objection is an attempt to turn the argument back on those who maintained that a specific clause is necessary to invalidate an act. This objection states that some acts merely prohibited in law are actually considered invalid acts. The example used is marriage between close relatives. In answering this objection, Pichler is obliged to show the force of custom. He does this nicely. Interpretations of some marriage laws have proceeded more along the presumed intention of the legislator than in accordance with the actual text of law. This interpretation has been used in regard to marriage between close relatives. Consequently, it is not that a prohibitory law actually invalidates from the force of its text but rather that the interpretation of the mind of the legislator has superseded the interpretation of the actual text. This is an excellent example how custom, through interpretation of a law, can induce a more serious effect than would be found in the examination of the actual text of law. It is, however, a comparatively rare use of custom. Most customs will lessen the effect of law.

54 "*Contra eum, qui legem dicere potuit apertius, est interpretatio facienda*" —R. J. 57 in VI°.

The fifth and final objection is an alleged comparison between natural and positive law. It is asserted that natural law invalidates what it prohibits. Therefore, positive law should do the same. Pichler answers this objection by showing that natural law invalidates what it prohibits only in two cases. The first case is the attempt to perform an act without the capacity to do it, e.g., to give away something which is the property of another. The second case is the prohibition of an act which contains perpetual malice and turpitude, e. g., a pact to commit sin. These two cases naturally involve invalidation in their prohibition. Beyond these cases a prohibition in natural law is not necessarily an invalidation in natural law. Taking this very restricted invalidation in natural law as a basis, Pichler intimates that positive law prohibits many things which are beyond natural invalidation and therefore requires for invalidation something more than a mere prohibition.[55]

It will be readily appreciated that the attempt to compare natural and positive law in the way indicated above is a misunderstanding of the function of positive law. The latter, while dependent on the former, is more directly concerned with the welfare and order of society. Hence, prohibitory laws can exist which need not be invalidating in order that their purpose be achieved. The legislator can easily determine which prohibitory laws he wishes to enforce with invalidity. If he does not specify this effect, it can be presumed that he does not desire it. At the same time, it must be remembered that this is the jurisprudence of Canon Law determined over a period of time. It was not the jurisprudence of Roman Law.

Leurenius[56] likewise considers some of the objections answered by Pichler, but he also has a word to say about Rule 64 of the Rules of Law of Pope Boniface VIII. We shall consider this latter doctrine later with the doctrine of Suarez and Reiffenstuel.

[55] *O. c.*, pp. 177-178; cf. also Pichler, *Epitome*, pp. 55-59.

[56] *L. c.*

To the objection that the will of the subject should be subordinated to the will of the legislator, Leurenius answers that when a prohibitory law is disobeyed there is no real need that the act be invalid to show that this subordination is lacking. Leurenius says insubordination is sufficiently shown by the dishonesty of the act. The very fact that the act is unlawful is enough to show that the will of the legislator is superior to the will of the subject. This is a good argument. All that is fundamentally necessary to demonstrate the superiority of the legislator's will is that a contrary act be illicit or unlawful. A more serious effect is actually beyond the fundamental meaning of a prohibitory law. But, again, it must be remembered that this is the jurisprudence of Canon Law, not Roman Law.

Fagnanus [57] can also be cited as maintaining that a prohibitory law does not necessarily invalidate a contrary act. As examples he gives the laws regarding the publication of banns of marriage and the exploration of the will of novices before profession. These laws bind, indeed, but if they are disobeyed the act is not invalid. Moreover, Fagnanus says that when the Council of Trent wished to bind so that a contrary act would be invalid, it definitely stipulated this, e. g., clandestine marriage.[58] From this action of the Council of Trent, Fagnanus concludes that an invalidating clause is necessary before an act can be invalid.

After stating that it is the opinion of canonists that a prohibitory law requires an invalidating clause before it invalidates an act, Biner [59] supports this opinion by maintaining natural law does not invalidate everything that it forbids; therefore, Canon Law should not do so. This is the reverse of the fifth objection considered by Pichler. Pichler answered this objection by showing how limited was the application of natural law to the legal effect of acts. Biner

[57] *Commentarium in Quinque Libros Decretalium* (Venetiis, 1729), c 7, X, *de constitutionibus*, I, nn. 27-30.

[58] Cf. sess. XXIV, *de reformatione matrimonii*, c. 1.

[59] *L. c.*

assumes this limitation and proceeds to show that if so fundamental a law as natural law does not always invalidate when it prohibits an act, no laws built upon it should have of themselves a more serious legal effect. It is easy to see that Biner demands the necessity of an invalidating clause to produce invalidity of acts contrary to a prohibitory law.

As usual, Suarez can be expected to dwell in detail on the necessity of an invalidating clause before a prohibitory law can invalidate an act. Three chapters of Suarez's monumental work on "Laws" are devoted to a consideration of the force of prohibitory laws.[60] In chapter XXV, Suarez discusses the actual meaning of a prohibitory law. He records the opinion of those who maintain the invalidating force of a prohibitory law. Their arguments are based on the interpretation of the law of Justinian, on the alleged inclusion of this law by Pope Gregory I and on Rule 64 of Pope Boniface VIII.[61] In the same chapter, Suarez records an opinion which he rejects that if no penalty is included in the law, the prohibitory law will invalidate an act. If a penalty is included the prohibitory law will merely prohibit an act but will not invalidate it. This opinion is based on the belief that the legislator does not intend to put a twofold onus on the transgressor of his law, namely, a penalty and the invalidity of the act. Therefore, if a penalty is included the act is illicit but valid. If no penalty is imposed the act is illicit and invalid.[62] Suarez rejects this opinion because he maintains that the imposition of a penalty is not sufficient indication that the prohibited act is invalid. In this same chapter, Suarez explains his own opinion.

In chapter XXVIII, Suarez explains the law of Justinian and considers the force of a prohibitory law in Roman Law.

[60] *O. c.*, lib. V, cap. XXV, XXVIII, XXIX.

[61] Among others Suarez cites Bartolus, Panormitanus and Covarruvias, *ibid.*, n. 2.

[62] Suarez cites as holding this opinion, Sylvester, Hostiensis, Joannes Andreas, *ibid.*, n. 4.

Chapter XXIX is a consideration of the force of a prohibitory law in Canon Law.

As was just mentioned, Suarez's own opinion of the force of a prohibitory law in itself is found in chapter XXV.[63] This is a consideration of a prohibitory law independently of its use in Roman or Canon Law. He admits there are two ways in which a prohibitory law can be studied; first, by investigating the fundamental meaning of a prohibitory law; secondly, by investigating the amplification of this fundamental meaning by subsequent legislation which would constitute a general rule.[64] In chapter XXV, Suarez investigates merely the first of these two ways to consider a prohibitory law.

Suarez's opinion is that a prohibitory law of itself does not invalidate a contrary act. He arrives at this conclusion because the effect of a prohibitory law must be studied from its text. That an act is unlawful if performed contrary to law is evident, Suarez implies, because the legislator does not want that act to be performed.[65] This is all that the law signifies. Nothing more can be deduced from the fundamental meaning of a prohibitory law. Suarez knows that this conclusion is not held by all, but he maintains that his adversaries are influenced by the use of prohibitory laws in systems of positive law.

Moreover, Suarez maintains that the prohibition of an act and its invalidation are two distinct and separate legal effects. If both effects are to be included in a prohibitory law, both should be sufficiently indicated. Where the prohibition of an act is indicated, a contrary act will be unlawful; where invalidation of an act is indicated a contrary act will be invalid. These effects are separable and must be

63 Nn. 12-14.

64 "Alio vero modo loqui possimus de verbo prohibendi ut ampliato, seu extenso per legem aliquam humanam constituentem regulam generalem sic interpretantem juridice sensum legis prohibentis, ut vim habeat irritantis, etiamsi per solum verbum prohibendi sine additione clausulae irritantis feratur."

65 *Ibid.*, n. 13.

separately indicated in the law. As an example of an unlawful but valid act, Suarez mentions an illicit but valid ordination.[66]

Suarez is not satisfied with maintaining that the possible twofold effect of a prohibitory law should be separately indicated by the legislator; he also strengthens his position by declaring that the invalidation of an act is odious and must not be assumed. Suarez relies on the application of two rules of law of Pope Boniface VIII.[67] In applying these two rules, Suarez says it cannot be doubted that the legislator could have indicated his intention more clearly in a prohibitory law if he wanted also to invalidate a contrary act. Therefore at most the invalidation of an act is doubtful if no invalidating clause be found in the law. It is right, then, Suarez says, that the minimum effect of a prohibitory law be maintained rather than its maximum effect.

Suarez also considers the favorite objection to his opinion, namely, that the will of the subject should not be preferred to the will of the legislator. This objection has already been considered, but it is worthwhile to note that Suarez patiently examines this objection and refutes it by indicating where resistance to the legislator's will is to be found. If the law prohibits an act, a contrary act is unlawful and sinful; if the law invalidates an act, a contrary act is invalid. This answer to the objection does not depart from the usual answer.[68]

Suarez's arguments are clear and persuasive. It is necessary to have a definite grasp of the theory of law, the right of the legislator to enact laws and also his duty to specify the effect of his laws. As a legislator, a superior cannot make his law more operative than his words indicate. Con-

[66] *L. c.*

[67] R. J. 57 in VI°: "*Contra eum, qui legem dicere potuit apertius, est interpretatio facienda*"; R. J. 30 in VI°: "*In obscuris minimum est sequendum.*"

[68] "Quia superior prohibet actum, non potest illi subditus resistere, quin peccet, et similiter si superior irritat actum, non posset illum valide efficere," *ibid.*, n. 14.

sequently, the effect of a prohibitory law is deduced from its text. Suarez correctly maintains that a prohibitory law of itself merely prohibits. It does not invalidate an act.

Using his discussion of the theory of a prohibitory law as a basis for a consideration of prohibitory law in the two principal systems of law, Roman Law and Canon Law, Suarez interprets a prohibitory law in Roman Law as also invalidating an act while in Canon Law such effect is not demonstrated.

In Chapter XXVIII, Suarez discusses the effect of a prohibitory law in Roman Law. Suarez had maintained that if the legislator wished to invalidate when he prohibited an act, he should specify this effect of his law. Suarez finds that the laws of Theodosius II and Justinian do specify this effect. Hence, Suarez freely admits that a prohibitory law also invalidated a contrary act in Roman Law.

In a parallel discussion of the effect of a prohibitory law in Canon Law, Suarez finds no such clear indication of the will of the legislator.[69] Suarez considers the arguments for the simultaneous prohibition and invalidation of acts in Canon Law and finds that these arguments are either inappropriate or are a repetition of the Roman Law. Suarez maintains there is no text of Canon Law which assigns a greater force than unlawfulness to an act contrary to a prohibitory law. He concludes, then, that in Canon Law a prohibitory law does not, without a specific clause, invalidate an act.

Reiffenstuel's opinion of the force of a prohibitory law is almost exclusively based on the application of such laws in Canon Law. His opinion is found in his treatise on the Rules of Law of Pope Boniface VIII.[70] Reiffenstuel mentions that there are two opinions regarding Rule 64.[71] The first opinion is based on the law of Justinian and the de-

[69] *O. c.*, lib. V, cap. XXIX.

[70] *Jus Canonicum Universum complectens Tractatum de Regulis Juris*, v. VII, R. J. 64 in VI°.

[71] "*Quae contra ius fiunt, debent utique pro infectis haberi.*"

cision of Pope Gregory I; the second opinion is founded on the decretal of Innocent III. The latter opinion, Reiffenstuel states, is the common opinion. He upholds this opinion not with the sustained energy of Suarez but by citing examples where prohibitory laws did not invalidate. These examples are taken from the decretals.[72] He also cites the Decree of Gratian.[73]

Reiffenstuel's importance in this discussion of the effect of a prohibitory law is his restatement of Rule 64 of Pope Boniface VIII. He says the true meaning of this rule is: whatever is done contrary to law, that is, contrary to a law which invalidates an act or demands some substantial form, is invalid.[74]

Leurenius [75] also briefly discusses the force of a prohibitory law in his study of Rule 64 of the rules of Pope Boniface VIII. Leurenius is inclined to think that this rule means that acts contrary to law can be annulled. However, this is an after thought with Leurenius. He feels that the first application of this rule is to the formalities and solemnities of acts. An act which does not fulfill a formality or is not adorned with the solemnity required in law is invalid. These formalities and solemnities, then, can be considered as necessary conditions.

At this time it is useful to see the rules Zallinger offers to aid the interpretation of invalidating laws.[76] The application of these rules will perhaps not be admitted by all canonists, but Zallinger himself thought they would apply to all invalidating laws. A discussion of the laws will reveal their possible application.

[72] E. g., c. 1, X *de matrimonio contracto contra interdictum ecclesiae,* IV, 16; c. un., *de voto et voti redemptione,* III, 15 in VI°.

[73] C. 28, C VIII, q. 1; c 10, C IX, q. 2.

[74] "Quidquid agitur contra ius, id est, contra canonem, aut legem, qua actus irritatur vel nullus declaratur, aut illius forma substantialis praescribitur, invalidum est, et pro infectis habetur." R. J. 64 in VI°, n. 7.

[75] *O. c.,* lib. I, tit. II, q. 133.

[76] *Institutiones Iuris Ecclesiastici,* Lib. III, § cclvii, f.

The first rule of Zallinger for the interpretation of invalidating laws says that an invalidating law has its effect in both fora.[77] The force of this rule is sought in the power of the legislator. Unless the legislator specifies that one or the other forum is only to be considered, the invalidity of the act must be maintained in both fora. This rule is sound in itself but will receive less application whenever the invalidity of an act can be demonstrated to be a penalty to be inflicted by a judge. However, if the law itself prescribes immediate invalidity, even though this invalidity be a penalty, Zallinger's rule is applicable.

The second rule of Zallinger urges an investigation of the text of the law in order to see exactly what is invalidated.[78] The force of this rule is found whenever the effects of an act are separable. The legislator may not wish to invalidate every effect of an act. Therefore, in a particular case some effects of an act may be invalid; others may remain intact by reason of divine or natural law.

The third rule of Zallinger emphasizes the force of an invalidating law even if one is ignorant of this law, even if one needs power to act.[79] The application of this rule is almost universal. Neither good faith nor the necessity to act is an excuse exempting from the force of an invalidating law. A possible exception may be found in invalidating laws primarily penal.

The preceding pages principally considered the force of a prohibitory law in its relation to the possible invalidation of an act. A few lines of summary will not be out of place since the same summary can serve as a partial explanation of canon 11.

It has been demonstrated that a prohibitory law of itself can only prohibit. No further and necessary effect can be

77 "Lex prohibens vel praecipiens utrumque forum afficiat."

78 "Perspicacia opus est in expendenda lege irritante ut appareat quid disponat et quatenus valorem actus tollat."

79 "Lex irritans directe vel indirecte vim suam retinet etsi invincibiliter ignoretur, aut necessitas valide agendum superveniat."

deduced from its fundamental meaning. This is primarily theory, but it is necessary to know this. However, a law cannot well be studied outside of the legal system of which it is a part. Hence the force of a law will depend not only on its fundamental meaning but also on the technical significance given to it by the legislator. Similar dependence will be found in doctrinal interpretation. If, then, a prohibitory law be studied in Roman Law, it must be admitted that such a law also invalidated an act even without a specific invalidating clause. This is clear from the texts of the laws of Theodosius II and Justinian. If, on the other hand a prohibitory law be studied in the system of Canon Law, no such clear texts are available. There are, however, texts supporting conflicting opinions. The influence of Roman Law must also be admitted in the formulation of the stricter interpretation of a prohibitory law. The weight of opinion, however, and the better arguments are not in favor of this opinion. For some time the common opinion of the force of a prohibitory law was that it did not invalidate an act unless this effect was expressly or equivalently stated in the law. This opinion is now the law of The Code of Canon Law. Hence, after centuries, The Code of Canon Law definitely looks upon a prohibitory law differently than was the view in Roman Law.

The interpretation of invalidating laws is not concluded with the study of the force of a prohibitory law. The Code of Canon Law in canon 11 mentions that invalidating laws can be identified not only by an express invalidating clause but also by an equivalent clause. The apparent meaning of an " equivalent clause " is not difficult to grasp. It means that such a clause must equal in intensity the force of an " expressly invalidating clause." This eliminates any implicit invalidation, but it would not necessarily eliminate indirect invalidation. A positive law, for instance, which demands certain formalities is *indirectly* an invalidating law, and the clauses which state the necessary formalities are *indirectly* invalidating clauses. It may be somewhat con-

fusing to use " direct " and " indirect " invalidation, but such expressions are used.[80] The important thing is to understand how an invalidating law operates: whether it operates directly, e. g., by invalidating an act, or indirectly, e. g., by establishing a definite form for the act to take.

But if indirect invalidation is contemplated in canon 11, implicit invalidation is not included. Implicit invalidation is the result of ratiocination and cannot be arrived at without deduction. Such invalidation is not recognized in canon 11.

The actual difference, then, between indirect and implicit invalidation is important. The former is a restatement of the law itself; the latter is a deduction from the law. The knowledge of this difference is not only important for actual use; it is important also for the study of the doctrine of earlier canonists[81] who use the word *" implicita "* in the sense of indirect invalidation.

In regard to the actual meaning of an " equivalent clause" in canon 11, there is even today no agreement. Some, as cited by Van Hove,[82] understand a law which assigns formalities or solemnities to an act in order to be valid, while others, also cited by Van Hove,[83] demand a clause with the same meaning as the actual word *"expresse"*. Van Hove himself is of the latter opinion.[84] Van Hove believes that the word *"equivalenter"* was inserted in canon 11 in order to eliminate the uncertainty which, he alleges, existed in the old law. Hence, he rejects the inclusion of laws which demand formalities under canon 11.

Van Hove's position is not entirely acceptable. He maintains that his opponents understand these laws as implicit invalidation which he rightly thinks is not considered in the

[80] E. g., Zallinger, *l. c.*

[81] E. g., Reiffenstuel, *o. c.*, lib. I, tit. II, XI, n. 243.

[82] E. g., Maroto, Coronata, Blat, Ojetti; *De Legibus Ecclesiasticis*, p. 167; cf. also Cocchi, *o. c.*, v. I, pp. 88-89; Cance, *o. c.*, p. 48.

[83] E. g., Toso, Leitner, Cicognani—*o. c.*, p. 168.

[84] *O. c.*, p. 168.

present law. Maroto, however,[85] gives no indication that he so understands canon 11. Maroto merely adopts the doctrine taught earlier, e. g., by Reiffenstuel, without using the same terminology.[86]

In arriving at a proper interpretation of the word "*equivalenter*" in canon 11, there is no reason to exclude any interpretation which can and does fulfill the meaning of this word. "*Aequivalenter*" has naturally a broader significance than a clause which has the same actual meaning as the word "*expresse*". Certainly a clause which has such a meaning is an equivalent clause, but this need not be the entire extension of the word "*aequivalenter*". A law which is framed so that its violation results in invalidity is certainly an invalidating law and would fall under canon 11. In this case the whole phrasing of the law is equivalent to an express invalidation. Consequently, it is better to say that any kind of equivalent invalidation is controlled by canon 11. This would include all clauses which mean the same thing as express invalidation and likewise include all laws which for validity demand formalities or solemnities

Two subjects, then, could be considered in this part of the study of invalidating laws. This discussion, however, will consider merely the necessity of formalities and attempt to determine whether an omission of these formalities will always invalidate an act.

There is no doubt that a rigid interpretation of the formalities required by law must lead one to maintain the absolute necessity of complying with these formalities in order to act validly. In demanding certain formalities, the legislator is understood to expect a compliance with these formalities. Anything short of complete compliance with the law is insufficient for validity. Since invalidity of the act is not stipulated as a penalty for the transgression of the law, such invalidity would occur even if, through ignorance or

[85] *O. c.*, p. 237.

[86] Cf. Reiffenstuel, *l. c.*

error, the formalities of the law were omitted in whole or in part. This was the doctrine of Strykius.[87]

The same absolute necessity for the observance of formalities, or the form of the act is maintained by Covarruvias. His doctrine is in regard to Roman Law, but the same principle had been employed in Canon Law. The specific case Covarruvias considered was the validity of a codicil. He maintained the only standard to judge the validity of the codicil was to compare it with the requirements of law. The codicil in question was devoid of some formalities. To judge its validity would be to compare it with the requirements of law. If the absent formalities, while in themselves useful and preventive of fraud, were not really demanded by law, the codicil would be valid.[88] Covarruvias recognized the right of the legislator to impose a definite form of act before he would recognize it as valid. While he wrote specifically of Roman Law, the principle upon which Covarruvias relied is equally applicable to Canon Law. The principle of law states that one's capacity to act and his manner of acting are under the control of law.[89]

Altimarus [90] can also be cited as teaching the absolute necessity for observing the specified form of an act. He says without any qualification that nullity results from a defect of an act. Such a defect would be found in the omission of prescribed formalities.

Reiffenstuel maintains that the omission of the substantial form of an act will render the act invalid. He says this is not controverted. He says nothing at all about the omission of details or accidental form.[91] Reiffenstuel cites sev-

87 *O. c.*, v. I. disp. VIII, cap. iv, n. 37: "defectus formae, quantumvis modicus, actum reddit ipso iure invalidum."

88 *Opera Omnia, de Testamentis,* cap. IX, n. 4.

89 *O. c., de Testamentis,* cap. IX, n. 13: "Per leges civiles non potest quis sine solemnitate iuris testari, cum ab eo potentia auferatur. Colligitur ergo parum eius voluntatem prodesse, quantumcumque ea manifesta sit."

90 *Tractatus de Nullitate,* Rubrica I, questio I, n. 15; "nullitas est vitium seu defectus rei gestae proveniens ob legis transgressionem."

91 *O. c.*, R. J. 64 in VI°.

eral decretals as his authority for the statement that omission of the substantial form will invalidate an act,[92] as well as the entire section of the Decretals on Testaments.[93]

Suarez devotes two chapters in his work on "Laws" to a consideration of the form of an act.[94] In the first of these chapters he analyses a number of rules which might control the efficacy of an act performed contrary to law. In the second of these chapters, Suarez considers the possible force of a clause which might be interpreted as penal.

There is no need to follow Suarez in his long and detailed analysis of the various rules offered to judge the validity of an act. But what is important, however, is Suarez's account of how to consider the imposition of a certain form.[95]

Suarez distinguishes between a form specified by law in the actual concession of power and the form also specified by law but presupposing the actual possession of power. In the former case, the form is so specified that its neglect will invalidate an act. The same invalidity would not occur in the latter case. This distinction is important. If a person, Suarez says, exercises delegated powers, he must exercise them in the way indicated; otherwise the act will be invalid. If, however, a bishop should not observe the form required in fulminating an excommunication, the penalty would none the less be inflicted. These are the examples which Suarez uses to show the difference between substantial and accidental form.

In support of his contention that the form of an act can be substantial, Suarez cites a decretal of Pope Innocent III.[96] In this decretal the Pontiff had imposed a definite manner in which his delegate should act. This form had

[92] C. 22, X, *de rescriptis*, I, 3; c. 42, X, *de electione et electi potestate*, I, 6; c. 2, X, *de rebus ecclesiae alienandis vel non*, III, 13.

[93] Cf. X, *de testamentis et ultimis voluntatibus*, III, 26.

[94] Chapters XXXI and XXXII.

[95] *O. c.*, lib. V, cap. XXXI, n. 8.

[96] C. 22, X, *de rescriptis*, I, 3.

been neglected, and the Pontiff annulled the act.[97] It is to be noted that in this decretal there was a concession of power which had been received by delegation. Hence in the actual concession of this power, certain stipulations were made. The conclusion is that such power could be exercised only in the way in which the grantor had conceded it. In other words, the power delegated and the manner in which it should be exercised were one item. A disregard, therefore, of the latter inevitably invalidated the former. No specific invalidating clause would be necessary because the power exercised had been conceded for use in a specific way. Suarez stresses this thought because there is in delegation a limitation of power.

Again, it must be remembered that Suarez is discussing the jurisprudence of his time. It is possible that such jurisprudence, since it does not rest on any immutable principle of law, may change so that the manner of exercising delegated power is no longer considered as juridically united with its actual exercise. The rule always remains that the manner of acting may be prescribed for validity, but the presumption in the law can well be altered. This is done in The Code of Canon Law.[98]

Suarez's explanation of the validity of an act if an accidental form is neglected is equally clear. Suarez considers this accidental form as something superimposed on the actual possession of power. The assumption, then, is that a person already possesses power but is obliged by law to exercise it in a certain way. The example Suarez uses is suitable. A bishop possesses power to excommunicate. He possesses this power by virtue of his office. None the less, there are certain formalities or solemnities which by law

97 *"Quum enim in litteris nostris eisdem principaliter mandaretur .... propter quod processum ipsorum contra nostri formam rescripti ac iuris ordinem attentatum irritum decernimus et inane."*

98 Cf. c. 203, § 2; *"Hos tamen excessisse non intelligitur delegatus, qui alio modo ac deleganti placuerit, ea ad quae delegatus est, peragit, nisi modus ipse fuerit a delegante praescriptus tanquam conditio"*; Canon 203, § 1 states that a delegate acts invalidly if he exceeds his mandate; cf. also c. 55.

should be fulfilled or employed. Suarez maintains that if a bishop neglects these formalities or solemnities, he still excommunicates validly. This is, of course, on the assumption that these formalities or solemnities are not prescribed definitely for validity. If such should be the case, Suarez's example is not suitable.

Suarez supports his statement on the validity of an act notwithstanding a defect of accidental form on a law of the Council of Lyons held under Pope Innocent IV.[99] This law prescribed that a decree of excommunication should be given in writing and that the reason for the penalty should be indicated. If these formalities were not heeded their neglect would be punished and even the sentence of excommunication might be revoked. This law did not invalidate the sentence of excommunication, but it did demand that certain formalities should under penalty be observed.

Suarez correctly analyses this law of the Council of Lyons. There is no indication in the law that any intrinsic limitation of power is imposed by the requirement of formalities. In fact, the sentence of excommunication is presupposed as valid although it could easily be revoked.

The two laws cited by Suarez are an interesting contrast. In both cases formalities were imposed which should be fulfilled. Yet the neglect of the formalities laid down by Pope Innocent III binds for validity, while the formalities laid down by the Council of Lyons do not obtain the same effect. Consequently, aside from an actual invalidating clause, formalities as such in the law of the Decretals did not necessarily bind for validity. The reason, then, that Pope Innocent III could say that neglect of the formalities invalidated an act, while a similar statement is lacking in the law of the Council of Lyons would have to be sought in the nature of the power exercised. When this point is examined wide divergence is found. The delegate of Pope Innocent III possessed power not by virtue of office but by the concession of

[99] C. 1, *de sententia excommunicationis, suspensionis et interdicti,* V, 11 in VI°.

his superior. The judge who excommunicated according to the law of the Council of Lyons already possessed the necessary power to act by virtue of his office. The former's actual power was limited in its concession; the latter's power was not limited by concession.

The practical effects of this distinction cannot be denied. But these effects are the result of decretal law and are not necessarily unalterable. The present law of THE CODE OF CANON LAW is milder [100] and does not consider the manner in which delegated power is exercised as of first importance. Kearney, for instance, says " ordinarily the delegate is obliged to execute his mandate in the manner prescribed by the delegator. If he does not, he acts illicitly, but validly, since the delegator is not presumed to decree a particular method of execution under the penalty of invalidity. The delegator may, however, so ordain. In this case the manner of executing the mandate is a *condition* required for validity.[101]

There is great satisfaction in realizing that the present law of THE CODE OF CANON LAW has definitely and clearly indicated how the formalities enjoined in the issuance of delegation are to be weighed. The discussion of Suarez is an able dissertation on the reflex principles which underlie delegation, but the application of these principles was not always easy nor could the knowledge of these principles be always assumed.

After discussing the fundamental difference between defects of substantial and accidental form, Suarez proceeds to weigh the effect of an invalidating clause.[102] It would seem that the presence of such a clause would always militate for the invalidity of a contrary act. Suarez, however, while admitting that such a clause is not necessarily penal, maintains that it can be penal and therefore must be judged as

[100] Cf. c. 203.

[101] *The Principles of Delegation* (Washington, 1929), p. 106; cf. also c. 39.

[102] *O. c.*, lib. V, cap. XXXII.

a penalty.[103] His reasoning is logical if such a penal clause is admitted. But the difficulty will be in determining when the invalidating clause is penal. Normally, it would be expected that an invalidating clause in regard to the form of an act would have direct reference to the act itself. In matters of delegation this would be almost universal. While it is not easy to see that the grantor of the delegation would wish to penalize the beneficiary of his bounty because of the fault of his delegate, the entire process is one item, and the defect of one part would, according to Pope Innocent III, invalidate the entire process. To say, then, that an invalidating clause may be penal so that the ministry of the delegation itself would be valid while the delegate could be punished for negligence would involve a contradiction in the meaning of the substantial form of such an act. Pope Innocent III maintained that the form of such an act is substantial and that its neglect would result in invalidity. The delegate, of course, can be punished for his negligence, but the ministry of his delegation remains invalid. There is scarcely an opportunity here to consider an invalidating clause as penal.

In support of his contention that an invalidating clause in regard to the necessary formalities can be penal, Suarez cites a decretal of Pope Alexander III.[104] In this Decretal, the Pontiff reprimands the Patriarch of Jerusalem for neglecting to ask the counsel of his Chapter. The Pope annuls acts performed in such a way. While the first glance at this decretal would seem to indicate that because of an abuse the Pontiff will annul acts, further consideration reveals that acts already so committed are annulled.[105] Pope Alexander III, then, is merely applying an already existing law to the case before him. What the Pontiff actually does is to weigh the act against the requirements of law and declare that the form of the law is not completed. It is, there-

[103] *O. c.*, lib. V, cap. XXXII, n. 2.

[104] C. 4, X, *de his quae fiunt a praclato sine consensu capituli*, III, 10.

[105] ....*si quae amodo feceris, auctoritate apostolica cassamus.*"

fore, an invalid act. It should not be said that the invalidity of the act is a penalty. Rather, it should be maintained that Pope Alexander III is insisting that the act be performed according to law. This law had been introduced for safeguarding administration, and its neglect would result in public harm. The same idea of fostering good and efficient administration is found today in The Code of Canon Law.[106]

The third and last point to be investigated in this chapter is a study of the presumption which supports invalidating laws. It is important to know whether an invalidating law is based on the presumption of fact or on a presumption of law. If the invalidating law is founded upon the presumption of fact, disproof of this fact would render the law non-obligatory. However, if the law is founded upon a presumption of law, the enactment would remain obligatory even if actual fraud did not exist.

In order to determine what presumption supports invalidating laws, it is necessary to recall the purpose for which these laws are enacted. It is true that some invalidating laws are enacted for the purpose of punishing crime. In such cases, the obligation to observe the law is founded ultimately upon the existence of crime. Therefore, if crime does not exist the law is inoperative. There is no intention on the part of the legislator to punish unless a punishable act is committed. On the other hand, many invalidating laws are enacted not to punish crime but to safeguard the welfare of the society and its members. Such a safeguard will be frequently introduced to obviate the danger which could actually harm the society and its members. The existence of this danger will be found in the ill-ordered desires and ambitions of men, in their frequently unscrupulous actions, and in their cool disregard for the welfare of others. Since such men make up part of a community and since their influence is always to be feared, it is entirely proper that a presumption of law should arise which would obviate

[106] Cf. c. 105, 1°.

such actions and influence. But in such a presumption no attention is paid to the actual existence of evil actions or undue influence. It is sufficient if the danger of such actions or influence be considered as existing. Herein lies the fundamental difference between a law based on the presumption of fact and a law based on the presumption of law.

What kind of presumption underlies canon 11 of The Code of Canon Law? If the first distinction be made between laws which demand formalities or solemnities in order to be valid, and laws which directly invalidate an act or declare a person legally incompetent to act, it will be readily seen that the former laws are based on a presumption of law. If, for instance, a certain age [107] is required before one can be admitted to the novitiate, this formality is necessary in order that the candidate can be assured that he is acting with sufficient reflection. Should such sufficient reflection actually be possessed before the age determined by law, the formality must none the less be fulfilled. Experience has taught that insufficient reflection has in the past, at least, caused candidates to enter religion. The danger of such insufficient reflection is always present, although, in a particular case, sufficient reflection may actually be present. Another instance where the requirements of the law must be met is the law governing the form of marriage.[108] This law is introduced to avoid clandestine marriages because such marriages would not be open to the challenge of possible impediments. Another reason is that marriage is a public act, and it should be reasonably celebrated publicly. The solemnities stipulated in the law on the form of marriage are introduced to safeguard the sanctity of marriage and to assure its publicity. This safeguard is based on possibility of improper marriages. This possibility is always present, and, consequently, even if the marriage contract is otherwise legitimate, the law must be observed. This is,

[107] Cf. c. 555, § 1.

[108] Cf. c. 1094.

again, a presumption of law. All invalidating laws which demand formalities or solemnities in order that an act be valid will fall under this classification of presumption.

If, in invalidating laws, a further distinction be made and attention be centered on laws which penalize crime, it is obvious that such invalidating laws depend on a presumption of fact. A simoniacal contract in Canon Law is punished with invalidity.[109] This law presumes that the crime of simony exists. It does not operate unless such crime does exist. Consequently, any excuse which would release from the crime of simony prevents the operation of the law. Further, since a crime is involved, everything which would be required for the proof of crime, is likewise required here before the law operates. This, of course, is not stated in every law which invalidates an act because of crime. But it is the theory according to which such a law is enacted.

The same presumption of fact does not support an invalidating law which directly invalidates an act or disqualifies a person from acting legally for reasons other than crime. Such laws may be introduced to protect the common welfare or to safeguard a state of life. They rest on the presumption that dangers exist which could harm the common welfare or reflect on the dignity of a state of life. These dangers are independent of actual deeds in particular instances. These dangers in the formation of an invalidating law are a presumption of law. Such invalidating laws are operative even if the danger described above is nonexistent.

Most invalidating laws, then, must be interpreted according to the meaning of canon 21 of The Code of Canon Law.[110] This is the common teaching of canonists, as, for instance, outlined by Michiels.[111] For all practical pur-

[109] Cf. c. 729.

[110] "*Leges latae ad praecavendum periculum generale, urgent, etiamsi in casu peculiari periculum non adsit.*"

[111] *Normae Generales Iuris Canonici*, v. I, p. 347.

poses it is the same doctrine of Suarez who criticized the opposite opinion severely.[112]

Granted that invalidating laws, exclusive of penal invalidation, are always operative, the question may still arise whether *epicheia* can be used.

Suarez[113] considers this point at length and maintains that *epicheia* cannot be used. He argues that *epicheia* does excuse from the obligation to observe a law but it does not grant power where this power had been curtailed by law. In effect, Suarez says that release from the prohibitory feature of the law might result from *epicheia* but that some positive act of the legislator would be necessary to restore this power.[114] This distinction between prohibition and invalidation in the same law is rightly criticized by Van Hove.[115] It is because of the prohibition that invalidation results. If the prohibition be removed by *epicheia*, the invalidation would likewise cease. Van Hove proves that this is the correct view of the use of *epicheia* in regard to invalidating laws. He says that an act prohibited by positive law is valid by the law of nature, and if the obligation of positive law be removed, the natural effect of an act must be recognized. Of course, if the act is invalid in natural law no use of *epicheia* is possible.

Van Hove, perhaps, gives the best explanation of the use of *epicheia* in regard to invalidating laws.[116] This author distinguishes laws which, when judged by *epicheia*, are beyond the power of the legislator from laws which, while within the power of the legislator, might be interpreted benevolently.

The use of *epicheia* is always an individual use. Its force is found in the reasonable supposition that the legislator

[112] *O. c.*, lib. V, cap. XXIV, n. 3.

[113] *O. c.*, lib. V, cap. XXIII.

[114] *O. c.*, lib. V, cap. XXIII, n. 3.

[115] *O. c.*, p. 301.

[116] *O. c.*, pp. 301-302; cf. also Maroto, *o. c.*, pp. 257-258.

does not wish to bind his subjects in extreme and unforeseen circumstances. But Van Hove maintains that these circumstances can actually place the action contemplated by the law beyond the power of the legislator. In such an instance, Van Hove says an invalidating law will not be operative. This must be admitted, for if the circumstances do render the legislator incapable of enacting a law, he is powerless to act, and his previous law cannot bind.

Van Hove, however, is careful to point out that it is far more difficult to use *epicheia* in extreme circumstances when the matter of the law remains within the power of the legislator. He does not deny the use of *epicheia* in such circumstances, but he says it can be admitted only with the gravest of reasons. For practical purposes this would amount to a denial of the use of *epicheia*.

That it should be difficult to use *epicheia* in matters that remain within the competence of the legislator is clearly seen when one remembers that an invalidating law is of itself a matter of grave importance. It must be assumed that the legislator has carefully and long considered the effect of his law not only in ordinary circumstances but also in such extraordinary circumstances as he could foresee. Consequently his intention should not lightly be interpreted as releasing from the obligation of an invalidating law.[117]

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[117] Cf. Van Hove, *o. c.*, p. 302 for his discussion of examples where the use of *epicheia* is asserted.

GUILT OF THE PLAINTIFF IN A MARRIAGE CASE

THE subject proposed here for discussion is not so much one of policy as it is of interpretation. We are here to express an opinion on the true meaning of the latest response given by the Pontifical Commission for the Interpretation of the Canons of the Code concerning the law of accusation in matrimonial procedure.[1] We interpret unofficially, therefore, this official interpretation.

Since ours is a work of interpretation we should decide in the beginning whether there are any special criteria for interpretation, to which we are bound. There is no doubt that we must apply the strict interpretation to the prescript of canon 1971, § 1, 1° and the official responses to doubts concerning it. Canonists have been divided concerning the penal or non-penal nature of the loss of right to attack one's marriage as null. An attack upon his marriage contract as null is the personal right of a consort. Roberti was doubtful in 1933[2] about the penal nature of a loss of this right. He gave as his reason the absence of the word "dolus" in the second response of July, 1933.[3] In this recent response which we consider today, we find the words "dolosa" and "doli". We have no doubt that the loss

[1] "De Iure Accusandi Matrimonium.

"D. Utrum, secundum canonem 1971, § 1, 1° et responsum diei 17 iulii 1933 ad II, inhabilis ad accusandum matrimonium habendus sit tantum coniux, qui sive impedimenti sive nullitatis matrimonii causa fuit et directa et dolosa, an etiam coniux qui impedimenti vel nullitatis matrimonii causa exstitit vel indirecta vel doli expers.

"R. Affirmative ad primam partem; negative ad secundam.

Datum Romae, e Civitate Vaticana, die
27 mensis Iulii, anno 1942

L.S.

M. Card. Massimi, *Praeses*
I. Bruno, *Secretarius*

AAS, XXXIV (1942), 241

[2] *Apollinaris*, VI (1933), 442.

[3] *AAS*, XXV (1933), 345.

by a consort of the right of accusation is a penalty. Accordingly we must abide by the prescript of canon 19, ordering the strict interpretation for laws which lay down a penalty. But if you should disagree with us on the penal nature of the same, must we not still agree that the strict interpretation is to be applied? For canon 19 prescribes this type of interpretation as well for laws which restrict the free exercise of rights. If not a penalty, the loss of right to accuse for a consort is certainly a " coarctatio juris ". This was the conclusion of Roberti in 1933.[4] We must apply the strict interpretation. There is reason for my stressing this point. We may and some of us do express very rigorous opinions in this matter like Bartocetti. But in practice we may forget that we are legally bound by canon 19 to apply the strict interpretation which would be favorable to the party accused. That is the reason for which I have put stress on this point.

Before proceeding further in our discussion, we must mention a second criterion or principle according to which we shall be guided in our conclusions. If the loss to a consort of the right of accusation is a simple restriction of the free exercise of the right, no ignorance of the disqualifying or incapacitating effect of canon 1971, § 1, 1° will excuse the consort from loss of the right. Canon 16, § 1 prescribes that ignorance of nullifying or disqualifying laws does not excuse from their effects unless the opposite is expressly stated; and canon 1971, § 1, 1°, contains no such clause allowing for ignorance of its prescript. If, on the other hand, this loss of right is a penalty (which opinion we favor), it is certainly a vindictive penalty, and not a censure. It is understood that there is no right to absolution or a return of the right of accusation when contumacy is broken. It is a vindictive penalty which can be placed perhaps under n. 7 of canon 2291 (privation of an ecclesiastical right), though it need not be included by n. 7 since the list of vindictive penalties in canon 2291 is not taxative. If, therefore, the

[4] *Loc. cit.*

sanction of canon 1971, § 1, 1° is a penalty, it is a vindictive penalty. As such, ignorance of the law or even of the penalty alone does not excuse from the penalty. This is the prescript of canon 2229, § 3, 1° and a Rotal Sentence [5] will support this application to our matter. In conclusion of this second point, then, we hold that whether the sanction of canon 1971, § 1, 1° is a simple limitation of a right or a penalty in neither case does ignorance of the existence of this law or its penalty excuse a consort from the loss of his right if he otherwise be embraced by its prescript. We should like to make it clear now that we say—ignorance of this law or its disqualifying sanction will not excuse. We do not deny that ignorance of the malice of his action may excuse one from the loss of his right. About that we shall treat in a few moments. Thus far we have alleged two points, viz.: (1) we must apply the strict interpretation in practice; and (2) ignorance of this simple restriction or penalty does not excuse from the same.

Before the promulgation of The Code of Canon Law, in the old law itself [6] and in ecclesiastical jurisprudence,[7] a consort who caused the nullity of his own marriage lost the right of accusation. The principle involved is frequently stated, viz.: " fraus sua nemini patrocinari debet "—" ne commodum ex fraude reportet ". The cause of an impedi-

[5] S.R.R., *Decisiones,* XX (1928), 405, n. 5.

[6] V. g.: "Circa impedimentum quod vis et metus dicitur, ante omnia advertendum occurrit, neminem a iure admitti ad matrimonium ex hoc capite impugnandum, nisi qui violentiam et coactionem passus dicitur: reiici vero eum qui per longum tempus in matrimonio vixerit, dummodo eidem libertas et opportunitas reclamandi non defuerit; ita ut si liber iam a metu sua sponte in coniugali domo perstiterit, matrimonialia officia non detrectaverit, audiri amplius non debeat. Etenim qui liber a coactione metuve, facultate et opportunitate reclamandi non utitur, censetur consentire et ratificare quod antea invitus atque adverso animo fecerat."—S. C. Prop. Fide, instr. 1883, § 36—*Fontes,* n. 4901; *Acta et Decreta Concilii Plenarii Baltimorensis III, A. D. 1884,* p. 271.

[7] Cf. § 116 of the *Instructio Austriaca—Collectio Lacensis,* V. 1301. This *Instructio* was issued by Cardinal Rauscher of Vienna in connection with the Austrian Concordat in 1855, and was approved by a committee of five theologians and canonists in Rome on May 4, 1855.

ment, in the wide sense, was then understood to be the culpable agent in respect to the null marriage. Such culpable agent of nullity seemed to be limited to the deceiver in a case involving error of person, the extortioner of consent in a case involving force or fear, the abductor in a case of rape, the deceiver in a case involving unfulfilled conditions of consent, the conscious bigamist after the death of the first spouse, and the one who lacked puberty at the time of marriage in a case involving the impediment of age.

The Code of Canon Law changed ecclesiastical legislation in respect to the right of attack. No longer do the faithful other than the consorts have the right of attack in cases involving the so-called impedimens of public law. The right of others was limited to denunciation by canon 1971, § 2. But The Code of Canon Law retained the restriction and loss of right to the consort which existed in the old law. Our codifers worded the restrictive clause of canon 1971, § 1, 1°—"... nisi ipsi fuerint impedimenti causa." The first official interpretation of that clause in 1929 [8] made it clear that we are to interpret the word " impediment " as it had been understood in the old law, i.e., to include, force and fear, vitiated consent, etc. In another official interpretation of this clause made in 1933 [9] it was made clear that although our canon did not use the word " culpabilis ", it was to be understood as referring only to a culpable cause as did the old law. For according to that interpretation, the right of attack is not lost to one who is excused of culpability because of coercion or grave fear, or to one who has placed an innocent and licit cause of nullity; but only to the one culpably causing such nullity.

The meaning of the words, " culpable cause ", occupied the attention of canonists in a special way in books of commentary and periodical articles after the interpretation of 1933. Interpretations of the same became, it seems, rather rigorous. Some canonists used anything but the strict or

[8] *AAS*, XXI (1929), 171.

[9] *AAS*, XXV (1933), 345.

favorable interpretation in their commentaries. It is our opinion that they were led to this by their own anxiety and the laudable concern of the Sacred Congregation of the Sacraments over the amazing increase in the number of cases of vitiated consent. Concerned, and anxious to curtail them, to eliminate this substitute for divorce, as Bartocetti styled it so well, eager to protect the dignity of the sacrament, some forgot about the motive behind our law, and the old law, viz.: " fraus sua nemini patrocinari debet " and thought of the motive as uniquely a protection of the common good. Cases were proposed according to which the right was said to be lost to one who did not seem to be culpable in any canonical sense. Even the one who in moral innocence or ignorance learned of the non-fulfillment of a licit condition of virginity in the wrong way, by actual sex coition,—even he was branded the culpable cause of nullity. The presumption favoring culpability was made so strong by some as to become in practice irrefragable. Yes, it was difficult for some to see any application of the strict interpretation. In fact some seemed to apply the widest interpretation as if the loss of this right were a favor to be amplified.

The Pontifical Commission for Interpretation has come to our aid recently with its response to the doubt surrounding this question. In examining it we find that it replies directly to the source of doubt, viz.: the correct meaning of the words " causa culpabilis ". The culpable cause of an impediment or of nullity is to be understood as, and only as, the cause which is " et directa et dolosa ". The double conjunctive can only indicate that both predicates, viz. " directa et dolosa ", must be true in relation to the person who, as the cause of nullity, is disqualified. For, the negative answer to the second part of the question proposed indicates that a " cause of nullity " is not incapable if he is distinctively *either* the indirect *or* the non-malicious cause. An examination of the context, therefore, makes it necessary to conclude that a cause, if *only* direct or *only* malicious, is not

disqualified. He alone is incapable of attack who has been both the direct and the malicious cause of nullity.

We examine first the word " dolosa ". " Dolus " in our law is used in two sections of our code. In canon 103, § 2, room is made for the nullity, or at least the rescindibility, of acts performed " ex dolo." There " dolus " is understood as any cunning, craft, deceit or contriving. And the word " dolus " is also used, of course, in the penal law of the Church to describe a font of imputability in the commission of crimes (cf. canons 2199, 2200). The response of 1933 (ad II) was made to a question which used the term " culpabilis "; and the present response, to a question which uses the words " dolosa " and " doli ". " Culpa " is another word used in our penal law to describe a second font of imputability, viz.: juridical culpability (cf. canon 2199). This employment of both words—" culpabilis " and " dolosa ", gives us sufficient reason to conclude that our interpretation of the word "dolosa" in the present context, must be according to its sense in things penal.

This " dolus " is defined for us in canon 2200 as " deliberata voluntas violandi legem ". The malicious act (*actus dolosus*) is perfectly voluntary insofar as the will act concerned suffers no defect due to force, or fear or passion. It is also perfectly deliberate or deliberated insofar as the malice or evil is understood and intended, and there is no defect of the intellect act due to ignorance, inadvertence, or error. The word " dolosa " used now by the Pontifical Commission for Interpretation, therefore, makes it clear for us that its expression " causa culpabilis " of 1933 is intended to denote more than " culpa juridica ". The second font of imputability mentioned in canon 2199, viz.: culpable ignorance or negligence, is hereby set aside by this response as not sufficient to disqualify a consort. The commission considers only that person who, as the cause of nullity, has acted " ex dolo ", i.e., who knew the malice of his act and intended it. In a case of vitiated consent, therefore, to lose the right of attack a consort must know that it is gravely

wrong for him to make such condition and yet go ahead and make it by an act of his will. Note well—we say that he must know the grave malice of his action. We do not say that he must know of the sanction or penalty. " Dolus ", does not require such knowledge unless from positive law ignorance is granted as excusing. But as we have already stated, canon 1971, § 1, 1°, contains no clause granting excuse for ignorance. And considered as a penalty the loss of right to attack is vindictive falling under § 3, 1° of canon 2229, and so is incurred even in ignorance of law or penalty.

The Pontifical Commission for Interpretation, in the response under consideration, has used another necessary predicate of the person who is the cause of nullity so that he be considered as excluded from the right to make a lawful attack on his marriage. It is the word " directa ". To be excluded one must be not only the malicious cause (*causa dolosa*) but also the direct cause. Before attempting to arrive at a conclusion concerning the meaning of this word, we shall consider several possible interpretations. (1) The word " direct " can signify " immediate ", without medium. With this meaning a direct cause would be that cause which produced its effect of itself or together with another cause as co-cause but not *through* another cause. (2) A direct cause can be understood as the " voluntarium directum " since here we are concerned with a free willing cause. Then direct cause would denote that cause which produced an effect by *action;* and an indirect cause, that which produced an effect by omission. (3) A direct cause can be understood as the " voluntarium in se." In this sense a direct cause would intend or will the effect in itself; while an indirect cause (*voluntarium in causa*) would foresee the effect and permit it without intending it.

It is difficult to consign, without any hesitation, the meaning of the Pontifical Commission's word " directa " to one specific meaning and to that one alone. But we can arrive at some conclusion by separating the certain from the less

certain or probable. We begin, therefore, by deciding what the term " direct " must include without doubt.

(1) Some canonists describe an act imputable " ex dolo " as a " voluntarium in se " or a *direct* " voluntarium ", and an act imputable " ex culpa " as a " voluntarium in causa " or an *indirect* " voluntarium." Now, the word " doloso " of our response already includes the notion of such *direct* " voluntarium." But the Pontifical Commission may have added the word " directa " just to make certain that it means, as the cause of disqualification, real " dolus " which is *direct* " voluntarium " and not mere " culpa juridica " due to culpable ignorance or negligence. It would be, perhaps, redundance, but that is better employed than to leave room for a doubt.

(2) We are quite certain that the word " directa " signifies an immediate cause of nullity. Such directness in causality then (we think) would not be true in the case of one who only deceitfully hid the existence of a diriment impediment before marriage. This nullity would be caused directly and immediately by the impediment itself and not directly by the party hiding it. Such person would be a " causa dolosa " but " indirecta ". To support our stand in this, it may be pointed out that little or nothing was said about such deceitful omission in the old law,[10] except in reference to *ligamen* after the death of the first spouse. It is quite true that in such a case one would gain by deceit. But because a specific law was enacted with the motive of punishing deceit, we cannot conclude that every case in which we find deceit is embraced by it.

(3) It is probable that the Pontifical Commission had in mind the distinction made by some canonists between " dolus directus " and " dolus indirectus ". He was said to be guilty of "dolus directus " who knew the evil effect of his action and intended it. But he, who knowing the evil effect to flow from his action but not wanting it, nevertheless did

[10] Smith in *The Marriage Process in the United States* (New York: Benziger Bros., 1893), seems to hold otherwise.

not refrain from placing the act, was said to be guilty only of " dolus indirectus ". We think it probable therefore, that the word " direct " was used in the present response to embrace only him who, for example, knew that the condition he made was wrong and yet, intending it, entered marriage. Consequently we think it probable that the mere knowledge by a man of a vitiated consent in his consort-to-be would not lose him the right of attack—if he did not become a direct co-cause by intending the same himself. He would be (we think) *causa* " dolosa " but " indirecta ".

Before we conclude our interpretation of this recent response it will be well to remark the following in regard to practice. " Dolus " on the part of the person who is the cause of nullity and genuine " dolus " is necessary. We must keep in mind, however, that our law presumes the external violation of a law as " dolosa " in the external forum, until the contrary is proved (cf. c. 2200, § 2). This presumption of law would seem to be strengthened if it is established that pre-marital instruction was received and perhaps some form signed which could scarcely leave room for ignorance of the malice perpetrated. The burden of proof because of canon 2200 alone which presumes " dolus " will rest with the party attempting accusation. We are not, however, upholding a theoretical possibility and then making it almost impossible in practice. It will be quite possible for certain consorts to establish either that they were innocent (*doli expers*) or that they were not the direct cause of nullity.

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Questions:

1. Can one be the *causa impedimenti vel nullitatis directa sed doli expers?*

Yes, when real " dolus " is not present through defect of knowledge. Invincible ignorance would leave a direct cause

" doli expers ". Vincible ignorance, if not affected, might allow us in one sense to call one a direct cause; but then he would be only juridically culpable and so, " doli expers ".

2. Can one be the *causa indirecta et dolosa?*

Yes, in several senses:

Certainly, if " dolosa " is understood in the wide sense embracing " culpabilis "; but only indirect because of juridical culpability due to ignorance or negligence (" voluntarium indirectum ", " voluntarium in causa ".)

Very probably, in a case of one hiding a diriment impediment (excepting, perhaps, crime, active rape and wilfully produced impotence, if at the same time " dolosa "). " Dolus " could be present, but the direct cause of nullity would rather be the impediment itself.

Probably, if one entered a marriage knowing and realizing the malice of his partner's conditioned or vitiated consent (" dolosa "); but only permitting it, not intending to cooperate (" indirecta ") and so not becoming a direct co-cause or co-author.

3. In the light of this recent response, are the following men to be considered the causa culpabilis nullitatis et inhabilis ad accusandum matrimonium?

(A) Anselm who marries Anna knowing that she intends never to have children and knowing that this evil intention might affect the validity of the marriage:

(a) If he intends to cooperate fully with her in carrying out this evil intention;

(b) If he intends to cooperate with her in carrying out this evil intention only for a certain period (e.g., two years), after which he intends to try to persuade her to have children;

(c) If he intends not to cooperate with her in carrying out this evil intention but intends to try to persuade her after the marriage to have children.

(B) Benjamin who marries Bertha knowing that she intends never to have children but not knowing that this intention might affect the validity of the marriage:

(a) If he intends to cooperate fully with her in carrying out this evil intention;

(b) If he intends to cooperate with her in carrying out this evil intention only for a certain period (e.g., two years), after which he intends to persuade her to have children;

(c) If he intends not to cooperate with her in carrying out this evil intention but intends to persuade her to have children immediately after the marriage.

(C) Charles who marries Catherine because her parents insist upon the marriage and threaten him with criminal prosecution because of his illicit relations with Catherine unless he enters the marriage. He alleges now that he totally simulated his consent at the time the marriage was entered, and asks that he be permitted to accuse the validity of this marriage not only on the basis of force and fear but also on the basis of total simulation.

A. (a) Yes, *if* he *knows* the grave malice of her intention and of his own intention to cooperate. He is then "causa dolosa" and a direct co-cause or co-author.[11] No, if he

[11] We have pondered seriously that interpretation which would demand a knowledge and an intention of the nullity of marriage to ensue, to designate one as "causa et directa et dolosa." At present we still do not see our way clear to allow such interpretation.

"Dolus" is defined as: "deliberata voluntas violandi legem." The knowledge that one is gravely violating divine and ecclesiastical marriage law, e.g., by an intention against the perpetual right of marriage, is sufficient to label him the malicious ("dolosa") cause of this improperly so called impediment. The Pontifical Commission, it seems, has used the word "nullity," only to indicate that the word "impediment" includes vitiated consent, force and fear, etc., i.e., also impediments improperly so called. (Cf. the response of 1929 and of 1933 ad II). We cannot find reasons therefore, to support an interpretation which would exclude from attack only that person who, as cause of the nullity, knowingly violated the natural law prohibiting a wilful attempt to contract a null marriage. To us it seems extreme. It would allow, for example, the one who maliciously extorted consent by grave threats to attack his marriage later, merely because he did not know that in doing so he caused it to be null. In

does not know such action to be gravely wrong. This is scarcely possible if he has a suspicion that the marriage will be invalid. Ordinarily one would consider it gravely wrong to enter an invalid marriage, and likewise gravely wrong to go ahead with an uncertain conscience, (" conscientia practice dubia ").

(b) The answer is the same as in (a) directly above. *Per se* the time element would make no difference. *Per accidens,* especially with his intention of persuading her afterward to a right intention, it might indicate a state of mind which we said in (a) was scarcely possible, viz., that he did not really know such action to be gravely wrong.

(c) No! Even if he knew the malice of entering such a marriage he would be a " causa dolosa " but only *indirect* according to an interpretation we think probable, (" dolus indirectus " is involved, making him only the indirect cause through another).

B. (a) Yes, if he knows that such cooperation is gravely wrong. He is then a co-cause, direct and " dolosa ". No, if ignorance of the malice removes " dolus ". He is then a direct co-cause but " doli expers ".

(b) This is answered as (a) immediately above. *Per accidens,* his good intention might indicate a lack of " dolus ".

(c) No, if he is in ignorance of any gravely wrong action on his part. He is then certainly " doli expers ". No (probably) even though he does know that he is doing something gravely wrong. He does not become *direct* co-cause. (Cf. 3 A (c).)

C. No. The perfect liberty necessary for real " dolus " would not seem to be present because of fear. He would be the direct cause but " doli expers ". We are referring to the basis of simulation since there would be no question of his right to accuse on the basis of force and fear.

its response of 1933 (Ad I) the Pontifical Commission declared that the *victim* of fear or coercion has the right to attack his marriage. It would seem to exclude the extortioner of consent. No distinction is made anywhere in respect to knowledge or ignorance of the nullity to ensue. "Ubi lex non distinguit, nec nostrum est distinguere!"

Cases and Studies

BEQUESTS FOR MASSES RARELY CREATE CHARITABLE TRUSTS *

The thesis of the present writer is that so-called bequests for Masses rarely create trusts, either charitable or private, but usually result in gifts from the testator to the priests who say the Masses, not as direct legacies from the testator, but through conduits, donees with power to make the gifts, transfers of future interests.

The decisions of the courts of the various States on bequests for Masses are divergent.[1]

* Assistance by Daniel E. O'Brien, A.B., Harvard College, LL.B., Harvard Law School, LL.M., Boston University Graduate School of Law, a member of the California Bar, in matters pertaining to common law is gratefully acknowledged.

[1] Hannan in Volume I of THE JURIST (July 1941), at page 243 sets forth these divergent views as follows:

"1—a charitable trust:

a—valid (this is the more general view); adopted also by the American Law Institute (in its *Restatement of Trusts*), where the bequest is not made to a specified priest;

b—invalid because the beneficiary is too indefinite to be sustained (this was once the view in New York, Wisconsin and Minnesota);

2—a private trust, that is, a trust for the benefit of one or a few private persons; in this instance, for the repose of the soul of the decedent;

a—valid (this is the current view in Iowa);

b—invalid (this is the view in Alabama) on the ground that it offends against the laws on perpetuities or because there is no living beneficiary to enforce the trust;

3—not a trust, but when given a specified priest, a valid gift to him (this is the view in Kansas, California, and Rhode Island; it was once held also in New York); this is the view of the American Law Institute in its.... *Restatement of Trusts.*

4—not a trust, but sustainable as funeral expenses (once held in the lower courts of New York and adopted in a decision in New Jersey in 1929).

One other opinion has been held, but not in the United States, viz., that such a bequest is a trust that fails because it is instituted for superstitious purposes.

It is submitted that the confusion of our common law courts on the subject of bequests for Masses is due partly to the lack of knowledge by non-Catholic judges of the nature of the Mass and of the relation of the testator and the priest in the matter of Mass Intentions, partly to inept language employed by some testators, and, it must be admitted, partly to the uncertain guidance of those few Catholic writers who have pioneered in the common law on this subject. Perhaps the most influential article by a Catholic author has been one titled " Trusts for Masses " in 7 *Notre Dame Lawyer* at page 42 (1931) by Professor Curran supporting the view that bequests for Masses *always* create charitable trusts.

A later view set forth by the American Law Institute (1935), in Section 371g of *Restatement of Trusts* is as follows:

> " A trust for the saying of masses for the soul of the settlor or for other purposes is charitable, since the religious benefit to be derived from the saying of such masses is, according to the doctrine of the Roman Catholic Church, not confined to the particular souls but extended to the other members of the Church and to the rest of the world.
>
> " On the other hand a legacy to the priest who is to say the masses may be a beneficial gift to the priest in consideration of his services in saying the masses."

And in 1939, Scott on *Trusts* in Section 371.5 on page 1994 stated:

> " By the great weight of authority in the United States, it is now held that a trust for masses is a charitable trust. These cases seem clearly sound. Although the saying of a mass may be for the particular benefit of a specified person who has died, the benefits are not confined to the particular soul but extend to the other members of the church and to all the world, according to the doctrines of the Roman Catholic Church.
>
> " For an exposition of the Catholic doctrine see: Attorney General v. Delaney, 10 Ir. R.C.L. 104, 107 (1875); Catholic Encyclopedia, tit. Mass; Curran, Trusts for Masses, 7 Notre Dame Lawyer 42 (1931)."
>
> " In several cases where a bequest was made to a particular priest for the saying of masses, the bequest was upheld not as a charitable trust but as a beneficial gift to the priest mentioned upon his saying masses.
>
> " Harrison v. Brophy, 59 Kans. 1 (1898);
> Sherman v. Baker, 20 R. I. 446 (1898);
> Slattery v. Ward, 45 R. I. 54 (1923)."

(The above three cases are cited in Section 124.4 in support of the above statement which is there repeated).

> The question has been adjudicated in sixteen States. The consequence is that considerable doubt must remain as to the view the remaining States would take were such a bequest to be brought before their highest court for adjudication . . ."

Hannan, in his recent scholarly study on "Bequests for Masses" in Volume I of THE JURIST (July 1941), at page 243,[2] has made what seems to this writer the most valuable common law contribution on the subject to date by his searching analyses and conclusion that only in the case where a definite fund has been deposited with some agent, requiring administration and not mere distribution, for Masses to be celebrated for a long period of time, is perhaps the proper use of the term "trust" justifiable in connection with Mass bequests.

This writer takes issue with Hannan, however, on the question of bequests for Masses specifying particular priests, and also on the question of bequests to a bishop for Masses to be said in specified churches. Apparently, Hannan takes the position that the bequests in the first case create direct legacies to the specified priests, and in the second case create charitable trusts.

The very great majority of Masses for the repose of souls of the departed are the result of *inter vivos* transactions.[3]

At common law title to the money given him vests in the priest "when, as, and if" the Mass is said in accordance with the request

[2] Cf. Chapter X of his standard work, titled *The Canon Law of Wills* (Philadelphia: Dolphin Press, 1935).

[3] Consider the following quotation from an article by the writer in Volume III of THE JURIST (January 1943) at page 129, titled, "The Parish Priest and the Federal Income Tax under the Revenue Act of 1942":

> "Take a typical case: A parishioner says to the priest: 'Father, please say a Mass for the soul of my mother'; and he hands to the priest $1.00. The priest replies: 'Very well'. The priest enters in his Mass Intention Book the name of the deceased person, the amount of the offering, the name of the person who made the request, and the date. Later, on saying the Mass, the priest completes the transaction and makes an entry to this effect in his Mass Intention Book.
>
> "Now assume that the priest instead of replying, 'Very well,' and no more, says, 'All right, I'll say the Mass.' Here the promise of the priest is not enforceable at common law. The transaction is not one of contract at common law, but a gift with condition precedent. By canon law, however, the priest is required to say the Mass.
>
> "Finally, assume that the layman did not deliver any money to the priest at the time of his request, but said: 'I'll bring you $1.00 next week, Father.' The priest said the Mass as requested. Here, the promise of the layman is not enforceable at common law on the ground that the promise of the layman is a mere gratuity. But Merkelbach reminds the layman that he is bound *ex justitia* to make the offering to the priest."

[The imposition of the condition precedent seems not to square with the priest's obligation to say the Mass even if he loses the stipend or it is stolen from him. Cf. canon 829.—ED.]

of the layman. By canon law there is a gift with the condition precedent, a free-will offering by a lay member of the Roman Catholic Church for partial support of the clergy. The delivery by a Roman Catholic layman to a Roman Catholic priest of a sum of money as an offering for celebrating and applying a Mass cannot constitute a trust *res* for it is self-evident that the priest cannot be a trustee of the money and at the same time the *cestui que* trust of that same money. Nor is the priest the employee of the layman or even of the congregation of laymen, incorporated or unincorporated. In two instances, at least, it has been contended that the priest, in receiving money for Masses, receives it, not as a *cestui que trust*, but as earned income in the course of the profession of clergyman.

The Commissioner of Internal Revenue has promulgated the following regulation: "... sums paid for saying masses for the dead ... are income to the recipients."—Reg. 103, s. 19.22 (a) 2. This regulation has never been upheld in any judicial decision. On the contrary, it was adversely considered in the case of *Reverend Francis J. Ross v. City of Philadelphia and the Receiver of Taxes,* decided in the Superior Court of Pennsylvania on April 22, 1942, and reported in 25 Atlantic Reporter, 2nd Series 834. In this case the Receiver of Taxes promulgated a regulation copied from that promulgated by the Commissioner of Internal Revenue. The Court held that moneys paid by laymen to a priest as offerings for Masses for the dead are not earned income, but gifts, " pure gratuities which under the canons of his church, he has no right to demand but is permitted to receive when tendered."

Moving from *inter vivos* Mass Intentions to bequests for Masses, let us assume twelve cases. A testator provides in his will:

1. " I give $300 for Masses for the repose of my soul."
2. " I give to Reverend John Doe of St. Bernard's Church, Los Angeles, $300 for Masses for the repose of my soul."
   a. Father John Doe never existed.
   b. Father John Doe died before the testator.
   c. Father John Doe survived the testator.
   d. Father John Doe, who was the pastor of St. Bernard's Church at the time the will was executed, had been transferred to St. Kevin's shortly before the time of the death of the testator.
3. " I give $300 to the bishop of this diocese for Masses for the repose of my soul."
4. " I give $300 to the bishop of this diocese for Masses to be said in the following three churches (naming them)."

5. "I give to St. Bernard's Church of Los Angeles (an unincorporated parish) $300 for Masses for the repose of my soul."
6. "I give to St. John's Church, New York (an incorporated parish) $300 for Masses for the repose of my soul."
7. "I give $300 to John Doe in trust for Masses for the repose of my soul."
8. "I give $300 to John Doe in trust, the income to be used for Masses for the repose of my soul."
9. "I give $300 to Loyola College of Los Angeles for Masses for the repose of my soul."
10. "I give all my estate, estimated to be worth $5,000, to the Archbishop of Los Angeles, charged with the obligation to have celebrated *in perpetuum* 50 Masses annually, the stipends for which to come from the general funds of the Archdiocese."
11. "I give for the purpose of establishing a pious foundation my house on Calle Rosario, estimated to be worth 1,700 pesos, exclusive of the land, and having a net rental of 180 pesos annually, to the Archbishopric of Manila, to establish a collative chaplaincy, subject to the charge that the incumbent celebrate or have celebrated 60 Masses annually for the repose of my soul and for the souls of relatives (named), the first chaplain to be my great grandson, Esteban, and thereafter my nearest descendant, preferably."
12. "I give for the purpose of establishing a pious foundation the residue of my estate, estimated to be worth $50,000, with a present net rental of $2,000, to the Archdiocese of Los Angeles, with the obligation to have celebrated for 40 years 50 Masses annually for the repose of my soul."

1. "I give three hundred dollars for Masses for the repose of my soul."

In order for him to determine what the testator meant by these words, it is necessary for the finder of fact to be reminded of some things which the instructed Catholic layman knows and believes as a part of his religion.

a. *What is a Mass?* The Mass is the central act of Catholic worship.[4] In the Mass, the priest is not merely praying.[5] The priest

[4] Gihr, *The Holy Sacrifice of the Mass* (St. Louis: Herder, 1939), p. 192.

[5] Mary Eaton, *The Little Ones.* (London: Sands, 1930), p. 139.

is doing the same thing that Christ did at the Last Supper [6] on the night of His Passion, when He offered to His Father His body and blood under the appearances of bread and wine in order to leave to the Church "a sacrifice which could represent the sacrifice offered on the Cross and conserve the memory of it until the end of time." [7]

b. *How is a Mass Intention Made?* Preliminary to the celebration and application of a Mass for the repose of the soul of a de-

[6] *The Little Ones, loc. cit.;* Merkelbach, *Summa Theologiae Moralis* (Desclee, 1942), III, 275.

[7] Council of Trent, Sess. XXII, *de Sacrificio Missae,* c. 6.

As an objective memorial, a real representation and reproduction of the sacrifice of Jesus Christ, the Mass, by its very nature and very object, has the scope of renewing, always and everywhere, the subjective memory of the sacrifice completed one time on the Cross for our redemption. The principal purpose of the Mass is "to render to God due worship of adoration and thanksgiving, of propitiation and petition; at the same time, it is also offered for men and it benefits them."—Gihr, *Les Sacraments L'Eucharistie,* tom. II, p. 374, quoted in Michel, *The Spirit of the Liturgy* (Liturgical Press, 1932), p. 60.

How all inclusive is the list of those upon whom the priest implores the blessings of every Mass can be seen from the various prayers, the English translation of one of which follows, the words spoken by the priest at the Offertory of the Mass, on the offering of the Host:

> "Receive, O Holy Father, almighty and eternal God, this spotless Host, which I . . . offer unto Thee, my living and true God, for my countless sins, trespasses and omissions, likewise for all here present and for all faithful Christians, whether living or dead, that it may avail both me and them to salvation, unto life everlasting."—Gihr, *The Holy Sacrifice of the Mass,* p. 175.

A priest celebrates each Mass in obedience to Christ's command: "This do for the commemoration of me."—Luke, xxii, 19; Council of Trent, Sess. XXII, *de Sacrificio Missae,* cap. 1 and canon 2. In celebrating Mass under Christ's command, a priest does not act in his own name.—Michel, *Spirit of the Liturgy,* p. 62. His act is morally the act of Christ and is to be attributed to Him rather than to the priest.—Merkelbach, *Summa Theologiae Moralis* (Brussels: Desclee, 1942), III, 277. Christ Himself is the principal minister of the sacrifice of the Mass.—Merkelbach, *ibid.,* p. 276. The priest acts only as a secondary minister of the sacrifice of the altar.—Merkelbach, *ibid.,* p. 278. "It follows that the Eucharist (the Mass) always and everywhere remains the spotless Sacrifice, as the chief Offerer, Jesus Christ, is at all times infinitely holy, although the visible and representative priest be ever so imperfect and unworthy."—Gihr, *The Holy Sacrifice of the Mass,* p. 117. Daily throughout the entire world the holy sacrifice of the Mass is offered on the altars of Catholic Churches. "From the very beginning it has always been the practice of the Church to offer Holy Mass for individual persons and for certain intentions."—Gihr, *op. cit.,* p. 183.

parted one, a request for the saying of the Mass must be made by someone to a priest. The priest enters in his Mass Intention Book the name of the deceased, the amount of the offering, the name of the person who made the request, and the date. Later, upon the celebrating and application of the Mass, the priest completes the transaction, making an entry to this effect in his Mass Intention Book.[8] The bishop has supervisory jurisdiction over all Mass Intentions of his priests.

c. *Efficacy of the Mass for the Souls of the Departed.* "The Church has declared, that the Mass most especially (*potissimum*) procures help and relief for the faithful departed. The Sacrifice of the Altar, accordingly, is the most effectual, all-sufficient and sure means of obtaining for the suffering souls in purgatory comfort and refreshment; for it helps them more than prayers and indulgences, more than fasting, alms and night-vigils, more than works of charity, mercy and piety which the living may offer for the departed."[9] According to apostolic tradition the Mass may be offered for departed souls who sojourn in an "abode of purification until they are purified in the pain of fire and the fire of pains, until cleansed from all defilement and found worthy to appear before the face of God."[10]

For convenience of the Bench and Bar to whom reports of common-law courts are more accessible than commentaries on canon law, the doctrine of the Roman Catholic Church in this respect is set forth as reported in *Rhymer's Appeal*, 93 Pa. 142, at page 146:

> "...There exists an intermediate state of the soul after death and before final judgment during which guilt incurred during life and unatoned for must be expiated; and the temporal punishments to which the souls of

[8] Before saying this Mass, it is the custom of the priest to recite a declaration of intention, found in the front of the Missal or Mass Book, praying to Almighty God that this Mass will yield ministerial or special fruits for the spiritual welfare of the soul of the particular departed in addition to all ordinary graces, spiritual advantages and blessings, temporal gifts and favors which God bestows by reason of the sacrifice offered. There is, and can be, no variance from the written ritual of the Mass, itself.—Cf. Canon 818. The priest must accurately follow his Missal and is forbidden to add other ceremonies or prayers of his own choosing. At the end of the Mass before leaving the Church, the priest may make a memorandum record of the fulfillment of the Mass Intention preliminary to the formal entry in his permanent Mass Intention Book.

[9] Gihr, *op. cit.*, p. 185.

[10] Gihr, *op. cit.*, p. 185.

the penitent are thus subjected may be mitigated or arrested through the efficacy of the Mass as a propitiatory sacrifice." [11]

d. *Only a Priest Has Power to Celebrate Mass.* Only a priest has power to celebrate Mass.[12] But every priest, no matter in what part of the world, possesses the same power in exactly the same degree. For this power and right of offering the holy sacrifice is inviolably imparted to the priest at his ordination. Every Mass is essentially of identical religious value regardless of the person of the priest celebrant, since it is Christ, the High Priest, who is the principal minister of every Mass.[13] Hence the same fruits of the Mass will result regardless of the identity of the priest who celebrates the Mass. If one of these priests, after having accepted a stipend for a Mass, should die without having said the Mass or would otherwise be rendered incapable of saying the Mass, Church law provides for another priest to complete the Mass Intention.

e. *Money for Masses is a Gift with Condition Precedent.* Money given to a priest by a layman is not the price or exchange for the Mass, or for a promise to say the Mass. The money is a gift with a condition precedent in common law, and title to the money vests in the priest " when, as, and if " the Mass is said in accordance with the request of the layman. The Mass cannot be bought. It is not for sale.[14]

f. *Limit on Number of Mass Intentions a Priest Can Accept.* No priest is allowed to receive more Mass Intentions than he himself can say within a year.[15] Except on Christmas Day, a priest is not

[11] The Holy Bible, in the II Book of Machabees (xii, 46) tells us: "It is, therefore, a holy and wholesome thought to pray for the dead, that they may be loosed for their sins."

[12] Cf. Canon 802.

[13] Gihr, *op. cit.*, p. 117.

[14] The money given to a priest at the time of the request for the saying of a Mass is called a "stipend" and probably represents the bread and wine which the faithful in former ages gave to the clergy for the sacrifice of the Mass. The Mass stipends usually received by a priest are given by the faithful to one who is the natural object of their bounty as a good-will offering towards his support. Mass stipends are of three kinds, 1. manual; 2. quasi-manual or *ad instar manualium;* 3. founded. Manual stipends are the usual ones received *inter vivos* and also under wills. The unusual ones, the second and third, will be illustrated later.

[15] Canon 835.

permitted to say more than one Mass a day for a stipend. He may, however, receive an additional offering for a reason extrinsic to the Mass as such, such as the lateness of the hour, the distance he has to travel, and so forth. A parish priest cannot say a Mass every day in the year for a stipend. He is not permitted to accept a stipend on eighty-seven days of the year, for on these days he must offer Mass for the whole parish. A priest may not be able to say Masses when ill and when on vacation. There are other occasions when a priest is not permitted to accept a stipend for the celebration and application of a Mass. Ordinarily a priest cannot accept Mass Intentions that cannot be said within a short time, generally thirty days. If a priest finds himself with Mass Intentions that cannot be fulfilled within the prescribed time, he must transfer these Mass Intentions to the bishop [16] or to another priest [17] who can say the Masses. If a person has offered a certain sum of money for Masses, without indicating how many Masses he desires, the number must be reckoned according to the ordinary stipends customary in the place where the donor was staying, unless the circumstances are such that a presumption will be warranted that he desired High Masses or wished to offer a stipend greater than ordinary. Canon 828 states that as many Masses must be celebrated and applied as stipends, even most small, are given and received.

g. *Ceilings on Amounts of Offerings for Masses.* The customary offering for a Mass Intention in this country is $1.00. St. Alphonsus said that the stipend should equal one-half or one-third of the priest's daily support. The priest has no right to stipulate the amount of the stipend. It is the right of the bishop to decree the amount of the stipend for his diocese. Normally Mass stipends cannot amount to even $365 a year, and ordinarily amount to much less. Consequently a priest must receive additional amounts for adequate support. This comes in the form of monthly offerings from parishioners to their parish priests for their support, v.g., $83.33 a month for the pastor and $50.00 a month for each assistant-pastor. In various parts of the United States various arrangements for the support of priests will be found. Priests have no salaries as such at common law. A definite ceiling on the aggregate amount which a priest may receive from his parish and from stipends has been set by the Church. That ceiling is stated as follows: "He should not

[16] Canon 841.

[17] Canon 838.

only have what is necessary for sustenance, but a sufficient amount for fitting recreation and hospitality, and a modest portion for future contingencies. He may also assist near relatives to some extent. If anything remains, it is to be used in charitable works." [17a]

h. *Transfer of Priests from One Parish to Another.* Priests are frequently transferred by their bishop from one parish to another, sometimes hundreds of miles distant from the parish in which the testator lived. Sometimes priests are transferred from parish work for special studies in Washington, D. C., Rome, Italy, and other countries. The places of these priests are immediately filled by new priests who may not have been known by the testator in his lifetime, yet who have the exclusive authority to say Masses in the parish church to which the testator and his family had belonged.

i. *Custom as to Selection of Priests to Say Masses.* It is the custom for executors and administrators to be guided by the wishes of surviving relatives in the selection of priests to say Masses whenever the priest chosen by the testator is unable to carry out the wishes of the testator. The bishop, of course, has supervisory jurisdiction of the selection of priests to say the Masses.

j. Canon law will not sanction the holding in trust of a Mass, even if it were otherwise possible.

It is submitted that with the aforesaid foundation the finder of fact may make the following inferences as to the meaning of the testator when he provided in his will: "*I give three hundred dollars for Masses for the repose of my soul.*"

1. The testator's primary purpose was the saying of Masses by one or more priests for the repose of his soul.

2. The testator expressed no choice of the priest or priests who were to say the Masses.

3. The testator wanted gifts, viz., offerings of three hundred dollars to be made towards the support of the priest or priests who were selected to say the Masses.

4. The testator did not intend that the money be held in trust.

5. He wanted his executor to select a priest or priests to say the Masses and gave him the power to make the offerings vesting title "when, as, and if" the Masses were said in accordance with the request of the executor. Technically speaking the testator made the executor a donee of a power of appointment. (As a practical matter, the executor is guided by the wishes of close relatives in the se-

[17a] "Stipend"—*The Catholic Encyclopedia.*

lection of a priest or priests to say the Masses, subject, however, at all times to the supervisory jurisdiction of the bishop over Mass Intentions.)

6. He did not intend to create a charitable trust.

Suppose the testator had provided: "*I give* $300.00 *for a monument to be erected over my grave.*" All authorities agree that such a bequest or provision is valid.

"A will may dispose of property for any object that is not illegal, immoral, or against public policy." . . . "Thus, a bequest may be valid when for a monument." [18]

In the monument case the executor is the donee of a power with authority to transfer in the future title to property, viz., money, to a monument merchant to be selected by the executor. Plainly no trust, charitable or private, is created in the monument case. Title to the purchase price of the monument is transferred under the law of sales.

The monument case and the Mass case are the same insofar as the executor is the donee of a power with authority to transfer in the future title to money to an individual to be selected by him, with no trust created, but while in the monument case title to the purchase price of the monument passes under the law of sales, title to the money in the Mass case passes under the gifts and future interests divisions of the law of property.

The great difference between the monument case and the Mass case deals, however, with the *duty* of the executor to exercise the power conferred upon him by the will. At common law, the executor is obligated neither in the monument case nor in the Mass case to carry out the authority granted by the testator, though in the event that he is willing to carry out the authority, objection by the heirs and next of kin will be of no avail. But in the Mass case, and this is the important difference, the full force and effect of Church law require all those under its jurisdiction scrupulously to carry out all wishes of the testator for Masses, as expressed in the will, subject to severe penalties, even excommunication.

The transaction of a bequest for Masses, from the common law viewpoint, is exactly the same as the *inter vivos* transaction between the layman and the priest with the addition of a conduit, the executor in this case, with power to make in the future a gift to the priest on behalf of the deceased.

[18] See 68 *Corpus Juris* 504 and cases cited *ibid.* in note 67.

In *Wilmes v. Tiernay*, 187 Iowa 390 (1919), the testator directed his executors to sell his real estate and expend the proceeds for Masses for the benefit of himself and his deceased wife. The will was contested. The doctrine of charitable trusts as applied to bequests of this character had not been adopted in Iowa. The contestant argued that the trust being private was invalid because it lacked a beneficiary. The court sustained the will as creating a private trust with sufficiently definite beneficiaries, the testator and his wife, for the repose of whose souls the Masses were to be celebrated.

Professor Curran writes that this decision is unsound in principle and that the doctrine often causes trouble on collateral issues and concludes " legislation would seem to be the remedy for such a condition." Hannan says: " The decision, it must be said, rests on rather insecure ground." It is submitted that the Iowa decision is right, though the finding by the court that there was a trust created was incorrect and unnecessary for the decision. Judge Stevens, speaking for the court, used language that would warrant the same decision on the ground that the executor was the donee of a power to make a gift to a priest or priests selected by him to say the Masses. He said:

> " The provision is little different from one for the erection of a monument after his death, or the doing of any other act that he might desire, not intended for the benefit of anyone living, but which, if living, he might lawfully do ... The only discretion confided to the executor was the matter of selecting the church and one or more priests to perform the office of saying Masses. Had the testator desired any particular parish or priest to receive the money or to offer prayers, he would doubtless have made the selection in his will. His purpose and intention were not rendered uncertain or indefinite by the failure to do this, and we see no reason why the bequest should fail because of uncertainty."

The Alabama court in *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327 (1894), after having ruled that bequests for Masses for the repose of the testator's soul created a private trust, was forced logically to decide that the provisions were invalid for lack of a beneficiary.

As in the Iowa case, there was no trust created, charitable or private, and such bequest can readily be sustained in Alabama, as well as in every other State, on the ground that the will provided for a donee of a power to make a gift to a priest or priests selected by him to say the Masses.

2. "I give to Reverend John Doe of St. Bernard's Church Los Angeles, three hundred dollars for Masses for the repose of my soul."

a. Father John Doe never existed.

In this case the finder of fact may make the following inferences as to the meaning of the testator:

1. The primary purpose of this provision was to have Masses said for the repose of the testator's soul. The testator did not intend to make Reverend John Doe his legatee, and no more; if he had so intended, there was a definite way to accomplish it, simply by providing: "I give to Reverend John Doe three hundred dollars", eliminating any words as to the saying of Masses.

2. The testator recommended that the executor select Reverend John Doe to say some or all the Masses.

3. The testator did not intend that no Masses be said for the repose of his soul, if Reverend John Doe did not exist.

4. The testator impliedly gave to the executor power to select a priest, if his own recommendation failed, to say some or all the Masses and to make the customary offerings vesting title to the money "when, as, and if" the Masses were said, in the priest so selected by the executor.

5. The testator did not intend to create a trust, charitable or otherwise, and did not intend to give a priest any legal or equitable interest in the money before the Masses were said.

Suppose the testator had provided: "I give to John Doe, the Quincy, Massachusetts, monument dealer, three hundred dollars for a monument to be erected over my grave." Now suppose there never was a monument dealer in Quincy, Massachusetts, or any place else, by the name of John Doe. Would the executor be authorized to select another monument dealer and pay three hundred dollars as the purchase price of a monument? There seems to be no reasonable objection to carrying out the testator's wishes in respect to the purchase of the monument. There should be less objection to carrying out the wishes of the testator for Masses for the repose of his soul where the recommended priest is non-existent.

The New Jersey case of *Chelsea National Bank v. Our Lady Star of the Sea, et al.*, 147 Atlantic 470 (1929), was one of a non-existent priest to whom was given by will three hundred dollars, "*one hundred dollars* [apparently of the $300] *for Masses for me,*" (the tes-

tatrix). The court held the bequest was void as to the non-existent priest, but as to the bequest for Masses stated:

> "It is the same as though the decedent had directed a certain amount to be paid for the funeral expenses or the placing of a suitable memorial over her remains.
>
> "Conceding that she could direct the amount of money for the interment of her body and the proper marking of the place thereof, most assuredly she could authorize the payment of a sum of money 'for the repose of her soul.' It becomes the duty of the executor to pay the sum of one hundred dollars for Masses in the same manner as the funeral expenses."
>
> "From the necessity of the case, an executor or administrator can pay the funeral expenses of the deceased; and although no one can compel him to carry out the directions of the will as to the testator's burial, yet if he does carry them out, the courts will protect him from claims on the part of heirs, next of kin, or residuary legatees."

Cf. John Chipman Gray, 15 *Harvard Law Review* 515.

It is conceded that the funeral case and the Mass case are the same insofar as the executor is the donee of a power with authority to transfer title in money in the future to an individual, but similarity stops at this point and in the funeral case title to the price of the funeral passes under the law of contracts and sales, while title to the money in the Mass case passes under the gifts and future interests divisions of the law of property. In the Mass case the executor selects the priest to say the Masses and makes the request and offerings in exactly the same manner as in the first typical *inter vivos* case set forth above.[19]

The New Jersey decision is correct but it can be rested on more secure foundation if the theory that the executor is a donee with power to make a gift is more definitely stressed.

b. The second hypothesis provides the case where Father John Doe died before the testator. It follows from what has gone before that this is not a case of lapsed legacy and that the executor may select a priest, make a request for the saying of Masses, and complete the gift to the priest "when, as, and if" the Masses are said. There is no trust, charitable or private. The executor is the donee of a power to make a gift.

Suppose the testator had provided: "I give to Richard Roe, undertaker of Los Angeles, two hundred dollars for funeral services as advertised by him in Los Angeles papers." Suppose that Richard

[19] Cf. footnote 3.

Roe went out of business before the testator died. Would the executor be authorized to select another undertaker? Would he be authorized to pay two hundred dollars to this undertaker with the request that services similar to those advertised by Richard Roe be rendered? There seems to be no reasonable objection to the exercise of this power by the executor. There should be less objection to carrying out the wishes of the testator for Masses for the repose of his soul where his recommended priest had predeceased him.

The funeral case and the Mass case are the same insofar as the executor is the donee of a power with authority to transfer title to money in the future to an individual to be selected by him, with no trust created, but while in the funeral case title to the price of the funeral services and supplies passes under the laws of contracts and sales, title to the money in the Mass case passes under the gifts and future interests divisions of the law of property.

Cases like that of *Estate of Julia Howard,* 5 Misc. Rep. 295 (N. Y.) (1893) are unsound. In this case, the testatrix made one bequest of $300 to "Rev. Father McLoughlin . . . for . . . Masses" and another to "Rev. James T. Cole . . . for . . . Masses." Both priests survived the testatrix but Father Cole died shortly after the testatrix and before anyone requested him to say any of the Masses. On a petition for instructions, the court ruled that the two bequests constituted legacies to the priests but that they were conditioned on the saying of the Masses requested, and that therefore the legacy to Father Cole had lapsed and that the Masses so desired by the testatrix could not be said by another priest. The court said:

> "I think the Rev. Mr. McLoughlin may still be entitled to his legacy on showing a future performance of the condition, but as that is impossible in so far as the Rev. Mr. Cole is concerned, the legacy to him is held to be void, and it will, therefore, fall into the residuum and belong to the legatee thereof."

As to Father McLoughlin's case, the court demonstrated its lack of knowledge as to *how a Mass Intention is made.* In the case of Father Cole the decision deprived the testatrix of having carried out her primary intention of having Masses said for the repose of her soul. In the Howard case application of the theory that the executor is a donee with power to make a gift would have guided the court to a correct solution in each of the two divisions of the case.

The advantages of the application of the theory that the executor is a donee with power to make a gift rather than the legacy theory

is apparent in that the former insures the fulfillment of the primary purpose of the testator, viz., to have Masses said for the repose of his soul, without imperiling this purpose by the possible intervention of the common law doctrine of lapsed legacies in the event that the priest, recommended for the saying of the Masses, should predecease the estator. In addition, it makes uniform the common law and the canon law in that title to the money does not vest in the priest until the Masses are said.

c. In the third hypothesis, Father John Doe survives the testator. The executor will carry out the recommendation of the testator and complete the gift to Father Doe. There is no trust, charitable or private. The executor is the donee of a power to make a gift.

Kansas, Rhode Island and California courts have decided in cases like this that direct beneficial gifts are made to the priests named, creating the relation of testator and legatee.[20]

It is submitted that these decisions are wrong, the courts failing to understand the true nature of Mass stipends, and consequently confusing a legacy with the creation by will of a power to make a gift on condition precedent.[21]

d. In the fourth hypothesis, Father John Doe, who was the pastor of St. Bernard's Church at the time the will was executed, had been transferred to St. Kevin's shortly before the testator died.

The statement of the testator that Father John Doe was pastor of St. Bernard's was merely descriptive and for the purpose of identifying the priest whom the testator recommended. The executor will carry out the recommendation of the testator and complete the gift to Father Doe. There is no trust, charitable or private. The executor is the donee of a power to make a gift to Father Doe.

3. "I give three hundred dollars to the bishop of this diocese for Masses for the repose of my soul."

Here the executor will carry out the recommendation of the testator. He will request the bishop to say the Masses and if the bishop assents, the executor will make the offering of three hundred dollars to him and title to the money will vest in the bishop on the saying of the Masses. If the bishop is not living and there is a vacancy in

[20] *Harrison v. Brophy,* 59 Kan. 1 (1898); *Sherman v. Baker,* 20 R. I. 446 (1898); *Slattery v. Ward,* 45 R. I. 54 (1923); *In re Hamilton,* 181 Cal. 758 (1919), (first part of case).

[21] See 69 *Corpus Juris* 824.

the office, or if the bishop should decline the obligation for any reason, the executor may select another priest. There is no trust, charitable or private. The executor is the donee of a power to make a gift to the bishop or to some other priest.

4. "I give three hundred dollars to the bishop of this diocese for Masses to be said in the following three churches (naming them)."

The following inferences as to the meaning of the testator are permissible:

a. The primary purpose of this provision was to have Masses said for the repose of the testator's soul. The testator did not intend to make the bishop his legatee.

b. The testator expressly made the bishop a donee of a power to select the priests to say the Masses; (in this case the pastors of the three churches named will be selected by the bishop, for under the law of the Roman Catholic Church, ordinarily the pastor has the jurisdiction as to Masses to be said in his church, subject only to the usual provisions of canon law pertinent thereto. The recommendation of the testator will, therefore, probably be carried out.)

c. The testator did not intend that the bishop act as trustee of the money, just as it was not intended that the executor or Father Doe should act as trustee in the preceding cases.

d. The testator wanted the bishop to arrange to make gifts to certain priests, in the same manner as the testator could have done in his lifetime. The making of the gifts, however, was subordinate to and contingent upon the performance by the priests of religious ceremonies deemed by the testator to be of more vital importance to him than all the money in the world.

The second part of *In re Hamilton*, 181 Cal. 758 (1919), is authority for the proposition that case 4 creates a charitable trust. This and similar decisions by other courts are wrong. The California court was correct on the preliminary facts as to the nature of the Mass and as to the jurisdictional authority of pastors under canon law, but ignorant of the nature of the Mass stipend. As legal title to the Mass stipends did not vest in the bishop, he was not a trustee. The priests were to take title, not as *cestuis que trustent*, but as donees. The money could not purchase the Masses, nor could it be consideration for any contracts for the saying of Masses. The

living and dead Christians, beneficiaries of all Masses, not objects of charitable trusts, could not be *cestuis que trustent* of the money.

The reasoning supporting the majority view is based on an incomplete understanding of the nature of the Mass stipend. Correctly understood and properly applied, only one conclusion is warranted and it is that, conceding such bequests to be charitable, they are charitable, *not because the benefits of every Mass extend to countless living and dead,* but *because the money is always for the advancement of religion, in providing for the support of priests* to be selected by a donee of a power. The bequest is always a charitable bequest, but *it rarely creates a charitable trust.*[22]

In the States which now declare such bequests for Masses valid as charitable trusts, such bequests can be logically sustained on the theory of the creation of a donee with power to make a gift to the priest on condition that the Masses are said as requested.

5. " I give to St. Bernard's Church of Los Angeles (an unincorporated parish) three hundred dollars for Masses for the repose of my soul."

St. Bernard's Church was not meant to be a legatee. Only a priest, himself, in his personal capacity, is entitled under canon law to take title to stipends, and then only as gifts for his support. The executor is the donee of a power to make such gifts, a power that requires the affirmative action of formally requesting a priest or priests to say the Masses requested by the testator and of making the offerings of three hundred dollars. The executor may follow the recommendation of the testator and select a priest of St. Bernard's Church and complete the gift of the money to him. There is no trust, charitable or private. As was said by Judge Head in *Festorazzi v. St. Joseph's Catholic Church,* 104 Alabama 327 (1893), where the testator had provided: " I give . . . to the Roman Catholic Cathedral in the city of Mobile, the sum of three thousand dollars, the same to be used in solemn Masses for the repose of my soul ";

> "... the form of the bequest repels the idea that a gift to a church for its own general uses was intended ..."

6. " I give to St. John's Church, New York (an incorporated parish) three hundred dollars for Masses for the repose of my soul."

[22] Cf. Scott on *Trusts,* section 371, *Advancement of Religion. Pember v. Inhabitants of Knighton,* Duke 82 (1639).

This is exactly like No. 5. The fact that the parish is incorporated is immaterial for the reasons stated therein.

7. "I give three hundred dollars to John Doe in trust for Masses for the repose of my soul."

If a trust were created, the trust *res* would have to be the three hundred dollars. The beneficial donee would be non-existing, for the priest who is to say the Masses would not yet have been named. The supposed trust *res*, the money, could not be used to purchase Masses. Christians, living and dead, beneficiaries of all Masses, as is mentioned in the Offertory of the Mass, could not be beneficiaries of the money, for the money is the subject of a gift to be used exclusively for the support of the particular priest selected to say the Masses. The words "in trust" are inaccurate and unlawyer-like. A "power" is of the nature of a "trust" but is to be distinguished from a "trust" by all clear-thinking common lawyers.[23] John Doe is not a trustee of the money. He is a donee of a power to make a gift, and after selecting a priest or priests to say the Masses, he has the additional power to complete the gifts by making delivery of the money to the priest or priests selected by him.

What Dean Ames said in "The Failure of the Tilden Trust", 5 *Harvard Law Review* (March, 1892) at page 398, is very pertinent on this point:

> "It may be said that there can be no trust without a definite cestui que trust. This must be admitted. If, for instance, property is given to A *upon trust* [emphasis mine] to convey to such person as he shall think deserving, and A ... conveys to B as a deserving person, there is properly speaking, *no express trust here*, [emphasis mine] ... B gets the legal estate. But it does not follow ... that such a gift is void. Even though there be no express trust, there is a plain duty imposed upon A to act, and his act runs counter to no principle of public policy ... the only objection that has ever been urged against such a gift is that the court cannot compel A to act if he is unwilling. Is it not a monstrous non sequitur to say that therefore the court will not permit him to act when he is willing."[24]

[23] See 49 *Corpus Juris* 1248.

[24] This quotation suggests the weak spot of the theory that the executor is a donee with power to make a gift, the court can not compel him, under that theory to distribute the stipends or to distribute them to the persons or churches named by the testator.—Ed.

Scott mentions an interesting Irish decision *In re Gibbon* (1917), 1 I.R. 448, and comments on it in his *Cases on Trusts*, substantially as follows:

In *In re Gibbon*, a bequest was made by a Catholic priest to his executors, also priests, to dispose of " to my best spiritual advantage, as conscience and sense of duty may direct." It was held that although this was not a charitable trust or a beneficial gift to the executors, yet the executors might perform if willing. The Irish court said:

> "It is true that there is no living cestui que trust who can enforce it. ...The Court is not asked to compel the enforcement of this trust and the executors are willing to carry it out; and I can see no sufficient ground for refusing them to effectuate, as they propose to do, the expressed intentions of the testator."

This Irish case presents an example of a common-law power in a donee to transfer title to personal property in the future, superimposed with the obligation under Church law to carry out the pious causes provisions of the will.

8. " I give three hundred dollars to John Doe in trust, the income to be used for Masses for the repose of my soul."

The writer concedes that the testator intended to create a trust in this case. It can be argued with considerable force that a charitable trust was created, charitable because the income of the *res* was for the advancement of religion in contributing to the support of priests.[25] The great body of Roman Catholic priests throughout the world constitute the indefinite beneficiaries of the proposed charitable trust. John Doe has been named the donee of a power to select one or more of these priests to say the Masses and to make gifts to them of the income from three hundred dollars. A selected priest has no vested interest either in the three hundred dollars or in the income until he has said the Masses, and then he takes legal title to the appropriate Mass stipends, free of any trust. The primary purpose of this provision was to have Masses said for the repose of the testator's soul. The testator specified the number of Masses he desired by adjusting to the customary offerings the income from a definite amount of money, in this case about $7.00 a year based on current interest rates.

[25] Cf. *Pember v. Knighton*, Duke 82 (1639).

9. "I give three hundred dollars to Loyola College of Los Angeles for Masses for the repose of my soul."

Loyola College is conducted by a community of priests of the Jesuit order. The testator has recommended that this particular group be selected to say the Masses. The executor will carry out the recommendation of the testator and complete the gifts to them. There is no trust, charitable or private. The executor is the donee of a power to make gifts. The form of the bequest repels the idea that a gift to Loyola College for its general uses was intended.[26]

10. "I give all my real estate, estimated to be worth five thousand dollars, to the Archbishop of Los Angeles, a corporation sole, charged with the obligation to have celebrated *in perpetuum* 50 Masses annually, the stipends for which to come from the general funds of the Archdiocese."

This case involves an *equitable charge* and is to be sharply distinguished from a trust. It raises questions not relevant to the main thesis herein. However, it is submitted that no priest acquires an equitable charge upon the land for the saying of Masses, or a money claim at common law against the Archbishop for Masses, requested or not requested, though certain obligations are imposed upon the Archbishop by canon law.

11. "I give for the purpose of establishing a pious foundation my house on Calle Rosario, estimated to be worth 1,700 pesos, exclusive of the land, and having a net rental of 180 pesos annually, to the Archbishopric of Manila, to establish a collative chaplaincy, subject to the charge that the incumbent celebrate or have celebrated 60 Masses annually for the repose of my soul and for the souls of relatives (named), the first chaplain to be my great grandson, Esteban, and thereafter my nearest descendant, preferably."

The primary purpose of this provision was the saying of 60 Masses annually by a priest, descendant of the testator preferably, for the souls of the testator and certain relatives.[27]

[26] *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327 (1893).

[27] See Malcolm, J., at page 447, *Gonzales v. Archbishop of Manila*, 51 Philippine Reports (1928), 420.

The testator proposed to secure this purpose by the creation of a "pious foundation", a collative chaplaincy.

Collative chaplaincies create *equitable charges* on property to effectuate the saying of prescribed Masses.[28]

If the collative chaplain is a priest, he may say the Masses. Such collative chaplain receives his support in *part* at least, from the gift of the testator, through the conduit of the action of the Archbishop who delivers to the collative chaplain his "congrua" or reasonable support based on the income of the founded property, but not necessarily out of that income. The amount of reasonable support is determined by the Archbishop. The payment to the collative chaplain is of a nature similar to the monthly payments to parish priests in the United States of amounts deemed by their bishops adequate for reasonable support when supplemented by stipends. The parish priest receives the stipulated amount directly from the parishioners. The payments to the collative chaplain are not from a donee of a power to make the transfer of property in the future by a gift. They come from the Archbishop as conduit of the testator's gift, but here the conduit has risen from the position of donee with power to make a gift to that of owner of the property satisfying an *equitable charge* against that property. These payments to such collative chaplain are sometimes called *founded stipends* but they are not stipends in an exact sense of that word. The collative chaplain assumes the obligation of saying the Masses as part of his office. So, also, does the parish priest assume the obligation of saying in the United States eighty-seven Masses annually for his people, for which he is not permitted to accept a stipend. He, too, is under the obligation of saying the Masses as part of his office. In the case where the collative chaplain is not a priest and the Masses are said by a priest the offerings to the latter are called quasi-manual or *ad instar manualium* stipends. There is no trust, charitable or private.

12. "I give for the purpose of establishing a pious foundation the residue of my estate, estimated to be worth $50,000,

[28] The charge is to be paid out of the devisee's general assets and not out of the property devised. The devisee is not a fiduciary and with respect to the property merely owes the third person the negative duty not to destroy his charge by conveying it to a *bona fide* purchaser for value without notice.—Clark on *Equity* § 260. See: Scott on *Trusts*, § 10.

with a present net rental of $2,000, to the Archdiocese of Los Angeles, with the obligation to have celebrated for 40 years 50 Masses annually for the repose of my soul."

There is no trust, charitable or private. The case is similar to No. 11.

In the absence of any statute otherwise providing, powers may be created to do any act which the donor himself might lawfully perform.[29]

Powers most commonly created are those to appoint, to sell or exchange, to mortgage, and to lease, manage, control, or the like.

In addition to these common powers, a power to transfer property by gift may be created. No authorities need to be cited to support the proposition that a donor in his lifetime could have delivered money to a third person with power to make gifts to Roman Catholic priests on condition precedent that said priests would say Masses for the intentions requested by the donor, with title vesting in the priests " when, as, and if " the Masses were said by the priests as requested by the donor. Take a specific example: A widow says to her daughter: " Take this money ($200.00) to Father Moran. Ask him if he can say two hundred Masses for your father (who had died intestate), so many a month, just as is set out in Father Lydon's book [30] which he loaned us." The daughter gives the two hundred dollars to Father Moran and states her mother's request. Father Moran takes the money and says: " Thank you. I believe that I can say these Masses." Later he says all the Masses as requested.

The widow is the donor. The thing given is the two hundred dollars. The daughter is the donee of a power to make the gift on behalf of the donor. The priest is the donee of a gift on condition precedent, title to one dollar vesting in him as he says each Mass. No trust relation is created.

Now suppose this same widow makes a will, naming her daughter as executrix and giving her a mandate in the will for the same num-

[29] See 49 *Corpus Juris* 1249 and cases cited.

[30] " When Masses are to be said for the same person, the following schedule, generally adopted by canonists is a safe norm:

10 Masses 1 month	60 Masses 4 months
20 Masses 2 months	80 Masses 5 months
40 Masses 3 months	100 Masses 6 months "

—Lydon, *Ready Answers in Canon Law*, p. 492.

ber of Masses for the repose of her own soul. The daughter goes to a priest and gives him the $200 and states her mother's request. The priest takes the money (if he knows that the calendar of his Mass Intentions Book will warrant it and if he feels that he can take on the obligation) and says: "Thank you, I believe that I can say these Masses." Otherwise, he may say: "I can say fifty of these Masses. I suggest that you ask Father Weyer if he can say the others. If you prefer, I'll send your Mass Intentions to Maryknoll for the support of some one of their American priests doing missionary work in South America. They need all the help and support they can get down there."

The priest is the donee of a gift on condition precedent, title to one dollar vesting in him as each Mass is said. No trust relation is created. The relation of a priest to one who requests Mass Intentions is constant. It never varies. The offering is always in the form of a gift. *Inter vivos,* where the request by the donor is directly made to the priest, the relation is that of donor and donee; and where the request is made by a third person, the relation is three-sided, donor, donee of a power to make a gift, and donee. In will cases, the relation is always tripartite, donor, donee of a power to make a gift, and donee.

> "In accordance with the rule applicable to powers generally, no particular form of words is necessary to create a power by will, and it may be created by implication, it being sufficient if it appears from the will, in the light of the attending circumstances, that a power was intended to be created or conferred."[31]
>
> "A power, rather than a trust, is created by provisions authorizing one other than the beneficiaries of a devise or bequest to deal with or dispose of the property but not giving him title thereto."[32]
>
> "The creation by will of a power is to be distinguished from a devise or bequest of an estate or interest, in that a power is a mere right over, and not an interest in, the property which is the subject thereof."[33]

The welter of decisions on bequests for Masses by our American Courts which has resulted in the divergencies so graphically set forth by both Professor Curran and Hannan was brought about in the latter part of the nineteenth and the first part of the twentieth cen-

[31] 69 *Corpus Juris* 824.

[32] 69 *Corpus Juris* 824.

[33] 69 *Corpus Juris* 824.

tury. The approach to this problem has most frequently been the one advocating that the relationship created was that of trustee and *cestuis que trustent* of a charitable trust, though sometimes the position was taken that a private trust was created. Occasionally, it has been contended that the relation of testator and legatee has been created. So far as this writer knows no one has yet proposed that the solution of the problem is that the relation always includes that of donor and donee, with the conduit of a donee with power to make a gift on condition precedent.[34]

Every executor and trustee under wills containing bequests for Masses, and every priest and bishop concerned with the Masses, will find themselves called upon to decide questions that do not occur in the cases of ordinary bequest or in *inter vivos* Mass Intentions. In thirty-two States they will look in vain for common law judicial precedents and in the remaining sixteen States they will find a chaotic picture of confusion.

It is submitted that a better understanding by non-Catholic judges of the nature of the Mass and of the relation of the testator and the priest in the matter of Mass Intentions will clear the fact-path for an intelligent application of the law of powers and future interests in bequests for Masses, will tend to bring uniformity out of the present chaos and will strip away the difficult problems of the rule against perpetuities, of the lack of beneficiaries and of lapsed legacies that have frustrated needlessly so many times the will of testators to provide themselves with spiritual comfort.

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[34] "Even at the present time (1940) the American case authority on powers of appointment is distinctly thin in quantity—so thin that in nearly all States there are many important matters upon which local decisions are not yet conclusive, and in many States practically the entire field remains free for future development."—American Law Institute, 3 *Restatement of the Law of Property* 1810.

"So plastic is the state of law, it may be possible—thus the Institute and its advisers recognize their opportunity—'for the American law of powers in the course of its growth to adopt the benefits but avoid the anomalies of the English law.'"—"Future Interests Restated," by Myres S. McDougal, in 55 *Harvard Law Review* (May, 1942), 1077, at p. 1104.

"THE PRIEST AND VICTORY TAX": ANOTHER VIEW

The article titled "The Parish Priest and the Federal Income Tax Under the Revenue Act of 1942" by Rev. Kenneth O'Brien, appearing in the January, 1943, issue of THE JURIST, sets forth an opinion and draws a conclusion that cannot be sustained in the light of investigation and study from another view point.

The title of the article is faulty, because the words "Income Tax" are used; whereas the words "Victory Tax" should have been used since the whole article and its conclusion seem to bear entirely upon the "Victory Tax" as distinguished from "Income Tax." This of course could have been an oversight or a typographical error.[1]

For the purpose of clearness, it is here pointed out that this article will deal solely with the "Victory Tax." The purpose of the article is in a manner to refute Father O'Brien's opinion and conclusion as well as to set forth another opinion and conclusion arrived at from a different study and process of reasoning. Likewise for the sake of clearness, the term "Common Law" used by Father O'Brien to indicate common civil law as distinguished from common canon law, will be more specifically used under the terms, "Federal Law" and "State Law." Moreover this discussion will separate "Mass Stipends" from "Stole Fees."

THE CONTRACT ASPECT OF THE CASE

Here we must deal with two distinct and separate authorities, namely, the authority of the church as a moral entity and the authority of the state.

It is felt that it is not proper for anyone to advance the argument of a civil contract, either Federal or State, when dealing with the question of Mass stipends. The reason for stating this opinion is, that it is never possible for any priest to enter into a civil contract concerning Mass stipends, because the church as a moral entity has full jurisdiction in the matter of contracts relative to Mass stipends and she will never yield or waive her right to the civil authority. Since therefore, it is absolutely impossible for a civil law contract to exist concerning Mass stipends, the argument of a civil law contract should not be set forth, but consideration should and ought to be given to the contract that does exist by virtue of canon law. That

[1] [The article's argument and conclusions seemed to the Editors to apply to all taxes on all income of the priest derived from his priestly ministry.—ED.]

such a contract does exist seems to be the opinion of good authority.[2]

Moreover one can rightly hold the existence of a canon law contract because of the legislation that exists concerning the receiving of the Mass stipend, the application of the Mass according to the donor's intention, the making of restitution when conditions requested by the donor are not fulfilled, etc., as well as the binding force of all these laws.

Of course the civil courts both Federal and State no doubt would not recognize this type of contract since it does not conform to the terms of civil law contract. It appears then, that the contractual idea has little or no value in solving the problem of Mass stipends as taxable income under the "Victory Tax Act."

Mass Stipends Are Not Gifts But Compensation

The question may be asked, are Mass stipends gifts or compensation? The direct answer to the question is that nowhere have the Federal courts defined Mass stipends either as gifts or compensation or anything else. And until some Federal court does define them all opinions on the subject must remain private and speculative.

The citation used by Father O'Brien from a decision handed down by Mr. Justice Sutherland, of the United States Supreme Court, is not to the point relative to proving Mass stipends are gifts. There was no question of Mass stipends before the court, which Father O'Brien himself admits, when the decision was made.[3] Had there been any phase of the Mass stipend question before the court, the decision might have some weight.

The decision of Judge Cunningham, of the Superior Court, of the State of Pennsylvania, in the Rev. Francis J. Ross case, as quoted by Father O'Brien, is not to the point either. This case is a mu-

[2] Augustine (*A Commentary on the New Code of Canon Law* [St. Louis: Herder, 1925], IV, 188): "There is a contract between the one who offers the stipend and the priest who says the Mass". Cf. Bouscaren, *Canon Law Digest* (Milwaukee: Bruce Publishing Co., 1934), I, 398. Slater, *Moral Theology* (New York: Benziger Brothers, 1908), II, 123. [Rather two contracts seem to exist, both unilateral and gratuitous: The gift of money on the one hand; the promise to say the Mass on the other. Canon law does not object to State law's adoption of its theory of any transaction.—Ed.]

[3] [The argument was admittedly an *a pari* argument—Ed.]

Cf. The Jurist, III (1943), 129; *Bogardus v. Commissioner of Internal Revenue*, 302 U. S. 34.

nicipality income tax case, involving, namely, the Municipality of Philadelphia in the State of Pennsylvania. Whereas, the case of the "Victory Tax" under discussion by Father O'Brien is a Federal issue. Decisions of State courts have no binding force upon Federal issues.[4] The Federal Courts alone are competent to decide Federal issues. In passing, it is noted in Judge Cunningham's decision, quoted by Father O'Brien, that the Judge states the "offerings received by the appellant [Father Ross] are pure gratuities," but the Judge fails to prove they are and he fails likewise to state how he arrived at his conclusion.[5]

The regulations of the Commissioner of Internal Revenue will in no way be affected by the statement or decision of Judge Cunningham. For it must be held that the rulings of the Commissioner of Internal Revenue relative to income tax and the "Victory Tax" are binding upon all citizens of the nation until some Federal Court rules otherwise. The Internal Revenue Bureau and its Commissioner are agents of a unit of the Federal Government, namely, the Treasury Department, which has coercive power and the right to make rulings and regulations governing its department. Granted that the rulings and regulations might be held to be private and speculative, nevertheless, they are binding until reversed by a Federal Court decision.

In any disagreement with the rulings and regulations of the Commissioner of Internal Revenue, the private citizen is held to be governed by these rulings and regulations, and if he wishes he may seek relief from them through the Federal Courts. Hence in the matter of the ruling of the Commissioner of Internal Revenue relative to Mass stipends and the "Victory Tax", two courses are opened. (1) Pay the "Victory Tax" according to the ruling of the Commissioner of Internal Revenue; but pay it under protest, then seek to recover the amount so paid, by an action in a Federal District Court. (2) Start action in a Federal District Court before paying the "Victory Tax" to settle the validity of the ruling of the Commissioner of Internal Revenue. This is precisely what the Rev. Francis J. Ross did with reference to a ruling of the Receiver of Taxes for the City of Philadelphia, that touched upon Mass stipends. This, of course, was a State affair coming under State law.

[4] [This is true as to the present issue but as a general statement it needs qualification.—Ed.]

[5] [But it is ruling law, none the less.—Ed.]

It is here held that Mass stipends are not gifts but compensation. This opinion is so held because of the amount of legislation enacted by the church concerning Mass stipends, and, because of the purpose for which the stipends are given to the priest.

If Mass stipends are gifts, one fails to see the reason for all the legislation enacted concerning them. Why, one might ask, does the church command the Ordinaries to set, in or outside of a synod, a definite amount that can be demanded as a Mass stipend? If Mass stipends are gifts, surely the church would not command the Ordinaries to fix a maximum, and, if they wish, a minimum amount as the Mass stipend for their respective dioceses. Nor would the church command the Religious Orders as well as all other priests to be governed by this legislation. For gifts are free-will offerings, both as to the act of giving or not giving as well as to the free act of deciding the amount to be given or the thing to be given.

If the act of giving, as to the amount, is restricted by legislation, certain it is that there is no freedom of action as to the amount on the part of the donor, for the donor acts not according to his own mind but according to the mind of the legislator. The fact that the donor is free to give more than the amount set by the diocesan legislation does not destroy the fact that there is a definite amount set by legislation as a Mass stipend. When dealing with Mass stipends it is this amount set by legislation that must be kept in mind.

Holding to the principle that acts regulated by definite legislation of the lawgiver are performed in compliance with his mind, it is difficult to see where a donor of a Mass stipend is acting according to his own mind when he gives a Mass stipend the amount of which is regulated according to the mind of the legislator. And since he is not acting, as far as the set amount of the Mass stipend is concerned, according to his own mind, he certainly is not offering a gift, but is simply complying with the mind of the legislator. One fails to see where there is any sign of a gift in giving a Mass stipend the amount of which conforms to the definite legislation of a lawgiver who regulates the amount of the Mass stipend.

The Purpose of the Mass Stipend Tends to Prove That Mass Stipends Are Compensation and Not Gifts

Mass stipends are properly held to be compensation, for the very definition of the word " stipend " according to modern usage proves

this to be so. The definition of stipend is " Compensation for work or services rendered." [6]

The church in allowing the Mass stipend for the support of the priest and commanding the Ordinaries to fix the amount of the Mass stipend by definite legislation, does not do so for the purpose of paying the priest for his services rendered in the saying the Mass, but for his general services [7] rendered to the church in the performance of all his priestly work. The Mass stipend is not supposed to be the priest's sole means of support. It is only one of them.

Some other means of support for the priest according to the different statutes of the various dioceses are penny collections, offertory collections, stole fees, a set amount of salary, the Christmas collection, the Easter collection, a combination of two or more of these, etc. Even in those dioceses where by a statute of the diocese the pastor is permitted, instead of a designated salary, to pay his bills for food and domestic help and take so much cash for his personal use directly out of the parish funds—the money so taken to pay bills for food and domestic help is allowed for the priest's support and is rightly called compensation for services rendered. It makes no difference what method is used to pay the priest his support, the purpose is the same, namely, the support of the priest.

Since Mass stipends are given to the priest for his support, as St. Thomas says they are,[8] an idea which is found elsewhere, v.g., " in canon law stipend is a general designation of means of support provided for the clergy; "[9] and since only those priests who perform the work of the church are entitled to be supported by the church, in general it can rightly be held that Mass stipends given for support, are given as compensation for the general services rendered to the church.

One fails to see any difference between compensation given, as a means of support, to a priest for services rendered to the church, and the compensation given to a layman for services rendered to his employer, which compensation is earned by the layman for the sup-

[6] Macmillan's Modern Dictionary.

[7] Keller, *Mass Stipends,* The Catholic University of America, Canon Law Studies, n. 27 (Washington, D. C., 1925), p. 23.

[8] St. Thomas, *Summa Theologica,* 2-2 q. 100, art. 2, ad 2; (Keller, *op. cit.,* p. 23).

[9] *Catholic Encyclopedia,* XIV, 296; cf. Ayrinhac, *Legislation on the Sacraments,* p. 135.

port of himself and his family. Whether the compensation is called Mass stipends, as in the case of the priest, or salary, wages, remuneration, commission, bonus, allowance, etc., as in the case of the layman. The purpose of the compensation is the same, namely, support.[10]

It would seem to follow, that since Mass stipends are regulated by legislation, and the amount fixed for the Mass stipend is according to the mind of the legislator and not according to the mind of the donor of the Mass stipend, and since Mass stipends are given to the priest as support, they may rightly be considered compensation for the general services rendered by the priest to the church. And since they are compensation they are not gifts and can rightly be considered as taxable income under the "Victory Tax Act."

Stole Fees

As to the money commonly called stole fees received by the priest for the performance of certain acts in connection with funerals, marriages etc., it is difficult to see how anyone can call these gifts. The very definition of the word fee is "payment for services rendered, recompense, fixed charge for a certain service or privilege."[11]

Moreover, stole fees are and must be regulated, as to the amount, by an act of the legislator. The legislator being either the provincial council or the bishop.[12]

If a legislator fixes definite fees, as to the amount, for the performance of certain acts, certainly they are not gifts and the priest who performs the acts under the prescribed conditions has a right to demand the fees, for that is the intention of the legislator in fixing the fees. Fees are always considered remuneration for services rendered and as such are taxable income under the "Victory Tax Act."

Salary or Gifts

Under this heading that part of Father O'Brien's argument is taken up by which he tries to prove that the cash money a priest receives from the parish funds is not salary but a gift.

[10] [But a man can *support* a needy relative by *gifts*, and the latter would not be subject to the income or the "Victory" tax.—Ed.]

[11] Macmillan's Modern Dictionary.

[12] Canons 1234, 1237, 1504, 1507, 1909. [The force of this argument would obviously not extend to voluntary offerings for which no demand was or could be made as in the case where no tax was set by proper authority.—Ed.]

Father O'Brien fails to take into consideration the fact that all parishes in the United States are canonical parishes and therefore true benefices in the same sense.[13] He fails likewise to note that the pastor of a parish is an inferior officer of the church having ordinary power[14] and that the pastor is allowed canonically by the common law of the church to draw from the parish funds for his own personal use the amount the statutes of the diocese tell him he may so draw for his personal use. For the pastor is the immediate dispenser of the parish funds under the supervisory authority of the bishop.[15] In a canonical sense this amount is drawn from the parish funds for the pastor's living and personal expenses. The pastor likewise is the one who canonically withdraws from the parish funds the amount the statutes of the diocese tell him he may draw and give to the assistant priest for the latter's living and other expenses, the pastor keeping that part of the allowance which the statutes of the diocese permit him to keep for the board of the assistant priest. In a word, the pastor is the one who canonically pays himself and the assistant priest, and meets all the parish bills out of the parish funds. This drawing and paying of parish money from the parish funds according to statute certainly is not to be considered as the giving of a gift to the pastor and his assistant. It is meant to be and really is compensation for services rendered by the pastor and the assistant priest to the parish. If they did not render the services they could not get the compensation.

The fact that the amount of money the pastor and the assistant receive respectively for services rendered to the parish is regulated by the legislation of the Ordinary, is another proof that this money is not a gift. As said before, when any money is given to a person, the amount of which is set by legislation, the amount so given, is not given according to the free will of the giver, as to the amount, but according to the mind of the legislator. Money that is regulated by legislation is never a gift as to the amount, but always a compliance with the mind of the lawgiver. Canonically, it can be

[13] Hannan, *Canon Law of Wills* (Philadelphia: Dolphin Press, 1935), nn. 308, 309, 310.

[14] Augustine, *Pastor according to the New Code* (St. Louis: Herder, 1926), p. 36.

[15] Comyns, *Papal and Episcopal Administration of Church Property,* The Catholic University of America, Canon Law Studies, n. 147 (Washington, D. C., 1942), p. 41.

rightly held that the pastors and the assistant priests in the United States do not receive gifts for services rendered to the church, but do receive a set salary according to the statutes of the respective dioceses. This salary is set as to the amount, according to the mind of the legislator of the diocese, namely, the Ordinary.

Civil Law Aspect

Considering the civil law aspect of the question, both Federal and State, which is the principal aspect Father O'Brien deals with, it is absolutely necessary to take into consideration the various civil law statutes relative to parishes in the United States. Canonically, all parishes are moral entities. In the United States all courts both Federal and State refuse to recognize any form of moral entity conferred by purely ecclesiastical authority.[16] Therefore in considering the civil aspect of this question the strictly canonical parish or benefice idea must be put aside, and the true civil and legal status of all parishes in the United States must be viewed in the light of the civil law only. For that is the only law the civil courts will consider with reference to the matter here under discussion, rightly or wrongly it makes no difference. Federal laws govern all the parishes in the District of Columbia and State laws govern all the parishes in the States.

It is to be noted that in the United States there is a variety of methods by which parish property is held under the civil law. There is the corporation sole, the corporation aggregate, the trustee corporation, etc., besides the unincorporated church society and the holding of church property by the bishop in fee simple.[17]

1. *The Corporation Sole*

Considering the corporation sole, one finds that the title to all the property of all the parishes in the diocese where this type of corporation exists, vests in the bishop as a corporation unto himself, or legally a corporation sole. Since the corporation sole is a civil corporation existing by virtue of and under the laws of the State, it is not unreasonable to hold, in a civil sense, that the pastors working under and for the bishop as a corporation sole are strictly the

[16] Hannan, *Canon Law of Wills*, n. 526.

[17] [Once permitted, the holding of ecclesiastical property in fee simple by the Ordinary was forbidden by a decree of the Sacred Congregation of the Council in 1911. Cf. The Jurist, I (1941), 131, 132.—Ed.]

business managers of that part of the corporation sole's property known as parishes over which the corporation sole has placed them in charge. As managers for the corporation sole they look after all the corporation's movable and immovable property in their respective parish districts. In general they look after all the upkeep of the corporation's property under their management, pay all bills, besides paying their own and the assistant priest's or manager's salary. Since civil corporations do not give gifts to their managers for services rendered in the discharge of their ordinary duties but pay them a salary, it must be held that the civil corporation known as a church corporation sole pays its managers and assistant managers salary for services rendered to the corporation in the discharge of their duties. Such duties being the ministrations to the spiritual needs of the members of the parishes of the corporation sole as well as the care of the properties of the corporation.[18]

2. *The Corporation Aggregate*

The corporation aggregate is a corporation made up of all the members of the parish [19] with the property rights vested in the corporation. This type of corporation exists in a good many dioceses. The board of directors of this type of corporation is empowered by the civil law to manage all of the corporation's business affairs. The bishop may be *ex officio* the president of the corporation, the pastor of the parish *ex officio* vice-president, with the vicar general and two laymen making up the rest of the board. There are some states that require the pastor to be the president of the board.[20] In any case the principle of the corporation is the same, i.e., the controlling of all movable and immovable church property by a board of directors of the corporation. This board transacts all the ordinary routine business of the corporation, such as paying salaries and other running expenses. Usually the pastor and the two laymen are authorized by the other two members of the board to look after these affairs. In extraordinary affairs, however, the full board of five members must act. In a great many cases nowadays, the pastor alone acts as the business manager of the corporation with the approval of the other members of the board of directors. This type of

[18] [But the manager, i.e., the pastor, can not sue the corporation sole for his salary.—Ed.]

[19] Hannan, *Canon Law of Wills,* nn. 528-538.

[20] Dignan, *Catholic Church Property,* p. 247.

corporation, like the corporation sole, does not give gifts, to its manager for services rendered to the corporation but pays him a salary, just as it does to all others who work for the corporation. It is not within the right of a board of directors of a civil corporation aggregate to give gifts to those who render services to the corporation, or to give a gift to any member of its board of directors. The funds of the corporation aggregate are not the funds of the board of directors as individuals but of the corporation itself.[21]

The services rendered by the priest to the corporation are the ministrations to the spiritual needs of the members and the aid given in looking after the temporalities belonging to the corporation. "All revenues belonging to the parish and controlled by the board of directors, shall consist of pew rents, offerings during Masses or other public religious services on Sundays and Holydays, special subscriptions for parochial purposes, donations and legacies in favor of the parish, earnings from property of the parish, proceeds of festivals organized for the benefit of the church . . . and all other moneys of like kind, etc."[22] This is true of all types of church corporations existing under the civil law. Since therefore a pastor who is connected with a civil corporation aggregate renders services to that corporation and he receives his salary from that corporation in a civil sense, such salary cannot be considered as a gift but must be considered as compensation for services rendered to the corporation.

3. *Unincorporated Parishes Whose Property Is Held in Trust by the Ordinary*

As to the unincorporated parishes not under the control of a corporation sole, the title of all the movable and immovable property of these parishes may vest in the bishop of the diocese and his successors in office (dry trust). It can be rightly held that this property, movable and immovable, is managed by the pastor of the parish appointed by the bishop as manager or agent acting in his name. Moreover, since the civil law recognizes the title of the bishop to the property held in the name of the bishop of the diocese and of his successors in office, as a trusteeship,[23] this said title is under the con-

[21] [What of the bonuses granted by the directors of industrial corporations? Besides, the whole body of the parish consents to the normal salary. It might be otherwise if the board wanted to give the pastor an additional bonus.—Ed.]

[22] Statutes of the Diocese of Crookston, p. 157.

[23] Zollman, *American Church Law*, p. 456.

trol of the civil law and all managers or agents managing such property must do so by virtue of and under the civil law. Such being the case, it is rightly and logically held that the pastor of an unincorporated parish the property of which is not under the control of a corporation sole but is held in trust by the bishop, receives his salary from the unincorporated parish by virtue of and under the civil law. This salary so received is not a gift but true compensation for services rendered by the pastor to the members of the unincorporated parish, i.e., the ministrations to the spiritual needs of the members and the management of the parish's movable and immovable property. Unincorporated parishes acting through a trustee in virtue of and under the civil law do not and cannot give gifts to pastors for all of the property of this type of corporation vests its title in the bishop as a trusteeship for the use of the members of the parish.

Nor can it be said that the bishop pays the pastor in this case since he holds title to the property as a trustee. He does not, but directs the pastor to pay himself out of the revenues of the said unincorporated parish, and if there is an assistant pastor to pay him also, as well as to pay all other parish bills, the pastor acting as manager for the bishop and his trusteeship.[24]

As to who pays the bishops, the answer is the bishops pay themselves. For the same theory can be applied to them as is applied to an unincorporated parish, namely, that as managers in civil law of all diocesan property as distinct from parish property properly so called, the bishops pay themselves out of the diocesan fund known as the *mensa episcopalis*. In the United States the *mensa episcopalis* is usually made up from the *cathedraticum* which is not a gift to the bishop but a tax upon every parish in the diocese.[25] In some dioceses the tax is a flat amount levied against each parish, in others it is a certain percentage of the gross income of each parish in the diocese. It is self-evident that the bishop's income is not made up

[24] [The author does not consider the possible case of unincorporated parishes that are given recognition as such by the State law without the intervention of a trustee, but it is fair to say that he would have applied the same line of reasoning to them. If one excludes the intention of the parishioners to make a gift, then he is left no alternative but to conclude that both canon law and secular law must seek the pastor's title in compensation.—Ed.]

[25] [The real *mensa episcopalis* in the strict canonical sense, would be an endowment of the See for the support of the bishop.—Ed.]

Cf. The Jurist, I (1941), 310.

from gifts but by means of taxation, and nowhere can it be proved that taxation is a gift.

Father O'Brien's citations from the *Alphonse Rose v. John Vertin*, *Tuigg v. Sheehan* and *Father Baxter v. Bishop McDonnell* cases, show but one thing, namely, that priests are not working for the bishops and the bishops are not the ones who pay them. This is absolutely true in canon law also. Canonically priests are working for the church and receive their support from the church as a moral entity. Civilly, in the United States, priests receive their support as managers or assistant managers of property belonging to either a corporation sole, a corporation aggregate or an unincorporated society, as well as for the services they render to members of these bodies as to their spiritual needs.

Since pastors in a civil sense can rightly be called managers acting alone or in conjunction with laymen in the management of church property they must pay the "Victory Tax" as is required under the provisions of the Revenue Act of 1942 as is set forth in Circular VT, page 2, of the Bureau of Internal Revenue, U. S. Treasury Department. Circular VT states, "Superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation."

The conclusion is that all bishops, pastors and other priests whose income is made up from Mass stipends, stole fees and a set salary from whatever source derived, or by whatsoever name it may be called, must pay the "Victory Tax" after they have made the proper deductions which the law allows. The reason as above set forth, is that these moneys are not gifts but compensation for services rendered.

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Replication

I welcome the reply of Father Lennon to my study on the nature of the income of a priest and I am grateful for the opportunity of reading his article previous to publication. His article brings to a sharp issue the two divergent views as to moneys received by a priest as such—the one that they are *gifts*, the other that they are *compensation*.

My contention is that, under the Federal Revenue Act of 1942, manual stipends for Masses are gifts and should not be included

within the gross income of a taxpayer. Father Lennon's contention is that they are compensation, and should be included as earned income within the gross income reported by a taxpayer. The gross income is the basis from which the Income Tax and the Victory Tax are both calculated after statutory deductions are made. My contention is supported by Section 111 of the Revenue Act of 1942 amending Section 22(b)(3) of the Internal Revenue Code. Father Lennon's contention is supported by Section 19.22(a)-2 of *Regulations* 103 of the Bureau of Internal Revenue of the U. S. Treasury Department. Mr. Justice Butler in the case of *M. E. Blatt Co. v. United States* (305 U. S. 267) in the course of his opinion said: "Treasury Regulations can add nothing to income as defined by Congress."

Manual stipends, under the Internal Revenue Code, must fall into one of the two categories—gifts or compensation. If they are compensation, that is, earned income, they are earned either by virtue of the relationship of employer and employee, or by virtue of the pursuit of a profession for gain, as for example that of a doctor or lawyer.

It is submitted that manual stipends are not earned income by virtue of the relationship of employer and employee, because thereby a priest would be the servant, at common law, and the donor of the stipend would be the master. It would be degrading to the priesthood and to the Roman Catholic Religion if a priest, in saying Mass, were the servant of a layman and the layman were the master of the priest, with all the respective rights and duties which flow from the common law relation of master and servant.

A prerequisite of the "Compensation Theory" is that the income be received for services rendered as requested. Advocates of the "Compensation Theory" are forced to admit that although the donor of a manual stipend expressly requests the celebration and application of a Mass and makes no request for other services, the stipend is not earned income for the services requested, viz. the saying of the Mass. They claim that the stipend is compensation or earned income to the priest "for his general services rendered to the church in the performance of his priestly work". Under the common law there is no obligation for one to pay for services rendered without request to third persons. In canon law it would be contrary to justice to require payment for such services. And what are the "general services" which a manual stipend assertedly pays

for? Admittedly not for the celebration of the Mass. Certainly not for the administration generally of the sacraments, such as the distribution of Holy Communion, the hearing of Confessions, the anointing of the sick. What is exactly the service which the manual stipend pays for according to the advocates of the "Compensation Theory" in the case of (1) a parish priest or his assistant? (2) a retired priest who accepts manual stipends but renders no other service than the saying of Mass? (3) a third-year theologian who may be ordained to the priesthood with the power to say Mass but without the other faculties of the priesthood?

If the advocates of the "Compensation Theory" abandon the position of compensation under the relation of employer and employee, they are forced to take the final position that a manual stipend is income earned by a priest in pursuit of a profession for gain. The fundamental weakness of this position is that it makes a priest receive a manual stipend for the Mass by virtue of a status recognized in the common law as that of independent contractor, when "the transaction cannot properly be described as a contract at common law".

In the event of retreat from the employer and employee position and from the profession for gain position, a safe stand can be made on the ground that a manual stipend is a gift on condition precedent. Title to the money will vest in the priest when he says the Mass as requested by the donor.[26] The purpose of a stipend always is the support of the priest celebrant, even though the motive of giving the stipend be the celebration and application of the Mass as requested.

A gift, at common law and canon law, is a voluntary transfer of property by one without any consideration or compensation therefor. The constituent element of the concept "Voluntary Transfer" is, according to Tanquerey,[27] the "faculty of choosing between contradictories, or between to do and not to do." So long as a donor has the freedom of choosing between offering or not offering a stipend, his act in offering a manual stipend is a voluntary one. The fact that by canon law the amount of the stipend is specified does

[26] [It can even be maintained, and perhaps should be maintained, that it is a gift without condition; for if the stipend should be lost, the priest would be obliged to say the Mass; this would not be so if he had no title to the stipend. Cf. canon 829.—Ed.]

[27] *Synopsis Theologiae Moralis*, II, 80.

not affect the essential elements of the transaction. Liberty of specification, by which a donor may choose between offering $1.00 or some other amount as a manual stipend, is not of the essence, but as Merkelbach [28] says, is a " perfection " of liberty. Hence a gift may be freely made even though the amount be determined by other than the donor. A man may make a gift of $5.00, for example, to a Symphony Association or Opera Reading Club, to be an active member. If he wished to be a supporting member, under the rules laid down by the association, he might have to make a gift of $25.00. Such a transaction is admittedly a charitable gift and allowed as a deduction under the Internal Revenue Code. In either case he is free by liberty of contradiction, although not by liberty of specification.

This writer is unwilling to concede that a priest or bishop is a salaried employee of any person, or body, incorporated or unincorporated, as that status of employee is expressed by the U. S. Treasury Department, Bureau of Internal Revenue, Regulations 106, sec. 402.204, which says:

> " Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done . . . . The right to discharge is also an important factor indicating that the person possessing that right is an employer . . . ."

By this view a priest is never a salaried employee, and no one under the guise of employer has the right or duty to withhold for Victory Tax purposes under the Revenue Act of 1942, or for any withholding as taxes or collections of taxes under future Revenue Acts. Furthermore, the Current Tax Payment Act of 1943 expressly exempts " ministers of the gospel " and consequently priests from the *withholding* provisions of the Victory Tax (now 3% reduced from 5%) and from the *withholding* provisions relative to the 17% Income Tax.[29]

[28] *Summa Theologiae Moralis,* I, 87.

[29] The Current Tax Payment Act of 1943 does not change the tax rates as legislated in The Revenue Act of 1942, but it does change the system of collecting the taxes at the existing rates.

The 20 per cent withholding is calculated to equal approximately the present 6 per cent normal income tax and the 13 per cent first bracket surtax (with

This writer believes that decisions of the common law courts in England, Ireland, New Zealand, Australia, Canada, India, and in the sixteen States of the United States where the question has arisen will support his contentions which are amplified in his book *Gifts for Masses,* to be published.

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EQUITABLE PRACTICES UNDER CANON 1097, § 2

A Gentleman's Agreement

Canon 1907, § 2 contains a positive and general law regarding the proper pastor's assistance at a marriage. It rules:

"In every case it shall be the rule that the marriage is to be contracted in the presence of the pastor of the bride, unless a just reason excuses. Marriages of parties belonging to different Catholic Rites shall be contracted in the presence of the pastor of the groom and according to the ceremonies of his Rite, unless a particular law rules otherwise"[1]

This is the positive will of the supreme legislator of the Church in framing a universal and stable practice to be observed in the entire Catholic world: "*In quolibet casu pro regula habeatur . . .*"[2]

average allowances for deductions for contributions, etc.) and the Victory Tax.

Technically, the Victory Tax will continue at the rate of 5 per cent of gross income over $624 a year, but actually only 3 per cent will be deducted and this is included as part of the 20 per cent withholding.

By an eleventh-hour addition to The Current Tax Payment Act of 1943, the withholding provisions do not apply to, among others, "ministers of the gospel". Consequently, bishops and pastors are not bound, and have not the right, to withhold. This addition is as follows:

"Collection of Tax at Source on Wages.

Definitions. As used in this part—

(a) Wages. ...The term 'wages' means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash, except that such term shall not include remuneration paid...

(9) for services performed as a minister of the gospel."

[1] This is a literal translation of Canon 1097, § 2 according to Woywod, "*A Practical Commentary on the Code of Canon Law*" (2 vols., New York: Jos. F. Wagner, 1925). This work will be also used in the subsequent quotations in English of the Canons cited.

[2] The Latin text of the respective Canons cited in italics by the author will be used also hereafter to denote an emphasis of these words in behalf of his argument.

During the elapsed period of twenty-five years after the promulgation of THE CODE OF CANON LAW many commentaries have already been written and published by prominent schoolmen on the entire treatise of matrimony; and many authentic declarations and solutions to proposed *dubia* have also been issued by the Pontifical Commission for the Interpretation of the Canons of the Code as to the correct meaning of the terms dealing with valid and licit assistance at a marriage.[3] All the well established general principles of the Code as well as the canonical norms issued by the Roman authorities, must be observed by those whom they bind.

It is a known fact, however, that the full rigor of the principles of canon law may be mitigated by what is commonly known as a " gentleman's agreement ", referred to in THE CODE OF CANON LAW as natural equity,[4] or as canonical equity,[5] or under the juridical phrase " *ex bono et aequo* ".[6]

Looking more attentively at the text of Canon 1097, § 2, and comparing it with the context of the entire rather lengthy Canon 1097, and with the various parallel texts connected with this matter, there is ample room, when several pastors have shared the burdens involved, for a proportionate reimbursement based on equity, or what is commonly called " a gentlemen's agreement ". The author's intention in writing this article is to offer a broad interpretation of this provision in view of the exigencies of daily life and to show that it permits a mutual agreement " *ex bono et aequo* ".

Paragraph 2 of Canon 1097 spontaneously suggests a division of the study based on its characteristics, as follows:

1. It is unique and peculiar in its canonical arrangement.

[3] Published in the *Acta Apostolicae Sedis* at various intervals. There are also several private collections of them, published by various authors, v.g. Sartori, P. Cosmas, *Enchiridion Canonicum seu Sanctae Sedis Responsiones post editum Codicem J. C. datae* (4. ed., Romae, 1934), Toso, Can. A., *Repertorium Juridicum Ecclesiasticum* etc. (Romae, 1932).

[4] Natural equity is mentioned v.g. in Canon 643, § 2: "...naturali aequitate servata, per aliquod tempus, mutuo consensu..."

[5] Forcellini, *Totius latinitatis lexicon*, s.v. "*aequitas*", n. 5: "Saepius sumitur pro aequalitate inter homines, quae ad iustitiam pertinet. Differt tamen a iustitia proprie dicta, quod haec secundum iura et leges semper iudicat, nec unquam ab iis discedit; *aequitas* autem remittit interdum aliquid, legesque, ubi opus est, benigne interpretatur, estque media inter ius summum et indulgentiam."

[6] Cf. can. 1500: "...cum debita proportione ex bono et aequo..."

2. It authorizes the presence of the pastor of the bride.
3. It foresees the existence of just reasons for exceptions in particular cases.
4. It stabilizes a general norm for marriages of mixed Rites.
5. It by no means excludes a compromise "*ex bono et aequo*".

I. Unique and Peculiar Arrangement of Canon 1097, § 2

Canon 1097, § 2, the topic of the present discussion, is unique in its canonical wording, technical construction, universal extension, and practical application.

Its canonical wording: it is unique from this point of view because it begins with the emphatic phrase: "In every case it shall be the rule...", thus stressing the legislator's desire that among other competent priests who might act as the "*testis autorizabilis*" of the Church to assist at a marriage celebrated within the limits of canon law, the proper pastor of the bride should have the preference.

Its technical construction. After stating the general rules regarding the *quis? ubi? quibus auxiliis? quomodo? quando?* as to the validity (Canons 1094-1096) and the licitness of a marriage (Canon 1097, § 1, 1°-3°), the supreme legislator winds up all these prerequisites in one simple phrase: "*...coram sponsae parocho celebretur, nisi iusta causa excuset*". It is, therefore, a synthesis of all the above mentioned canonical principles in this connection.

Its universal extension. This paragraph considers marriages not only between two Catholics of the Latin Rite, but also of parties of mixed Rites, i.e., whenever either of them belongs to one of the Oriental Rites.[7]

Its practical application. In the concurrence of the competence of several proper pastors who might equally assist licitly within the limits of the foregoing rules laid down in Canon 1097, § 1, 1°-3°, either in person or by a legitimate delegate, the supreme lawgiver of the Church foresaw the danger of conflict among them and, in many instances, also the possibility of abuse, arising especially from inadequate investigation as to the free state of the contracting parties. He preferred, therefore, to charge one pastor *ex officio* with responsibility in this regard, *the pastor of the bride* as a general

[7] The canonical phrase in Canon 1097, § 2: "...nisi aliud particulari iure cautum sit..." has a special reference to the United States as will be explained in a separate paragraph below.

rule,[8] calling him in a parallel text, "*parochus cui ius est assistendi matrimonio . . .*" [9]

The latent canonical reason why (*cur?*) determining the choice of the bride's pastor, is nowhere indicated in the entire Code; nor can it be anywhere reasonably surmised. Clifford in a recent commentary on Canon 1097 states: "All authorities agree . . . No canonical reason actuates the choice of the bride's parish. The motive is regard for womanly modesty, namely, that the man seek the woman and not she the man." Nevin entertains a similar view.[10] They fail, however, to quote canonical sources or authors of outstanding authority to this effect. Moreover, their statement seems far fetched and *sine fundamento in re*.[11] The legal preference certainly did not exist prior to the Decree "*Ne temere*" of August 2, 1907, where this wording first occurs, (art. V, § 5), later being incorporated in its entirety into Canon 1097, § 2.[12] Wernz, who is regarded as the "*princeps canonistarum*" in the pre-Code era, and who so abundantly cites all possible customs and authorities, would certainly not have overlooked this legislative innovation in favor of the bride's pastor, if there had been any such departure in the chapter "*Tametsi*" of the Council of Trent from the prevalent custom.[13]

[8] The pastor of her domicile or of the place where she actually resides with her parents or immediate relatives will, no doubt, be best informed about her qualifications and freedom in regard to marriage. This seems to be the *mens legislatoris* in this connexion.

[9] Cf. can. 1020, § 1: "Parochus cui ius est assistendi matrimonio, *opportuno antea tempore*, diligenter investiget num matrimonio contrahendo aliquid obstet." (Italics inserted.)

[10] Clifford, J. J., S.J., in *The Ecclesiastical Review*, CVIII (1943), 125, n. 3. Nevin, Rt. Rev. J. J., in *The Australasian Record*, XII (1935), 261-267.

[11] Canon 1097, § 2, in reference to Catholics of Oriental Rites, authorizes the groom's pastor; so also in mixed marriages the Catholic party's pastor would seem the best fitted to act. In our modern times, when women claim equal rights with men, it is in many instances the woman who seeks the man, as foretold by Isaias (iv, 1-3): "Et apprehendent septem mulieres virum unum in die illa, dicentes . . ."

[12] On the preparation and opportuneness of the Decree "*Ne temere*", cf. *AAS*, XL (1907), 513-575.

[13] Conc. Trident., sess. XXIV, *de ref. matrim.*, c. 1 (Richter, ed. Lipsiae, 1853, pp. 227, n. 43): "S. C. censuit, ad validatem matrimonii sufficere praesentiam solius parochi sponsae, quando matrimonium in parochia sponsae contrahitur, similiter sufficere praesentiam solius parochi sponsi, si modo matrimonium contrahatur in parochia ipsius sponsi".

Yet, he assures us that according to the Tridentine law both pastors, i.e. of the bride and of the groom are indiscriminately the proper pastors for a valid and licit assistance at a marriage, "nor is there any legitimate preference of the bride's pastor..." And he criticizes Schmitz and Schnitzer for advocating a preference of the bride's pastor according to the common law, a view which, he says, they cannot prove with solid arguments.[14] According to Aichner, there existed a particular law in the diocese of Brixen, Austria: "*Ubi sponsa, ibi sponsalia; ubi sponsus, ibi nuptiae*".[15] Therefore, there was no universal legislation on this matter up to the time of the Decree "*Ne temere*".

The reason, then, why the bride's pastor is given the preference must have a deeper canonical root than merely the "*womanly modesty*" as suggested by Clifford and Nevins. And this is to be sought in the requisites stressed in Canon 1097, § 1, 1°-3°, guaranteeing the absence of diriment impediments and all other defects affecting the contract. It is namely the legislator's well-founded supposition, corroborated by the facts of experience, that the bride as *a general rule* will mostly possess a domicile, quasi-domicile, or at least a month's residence, in a given parish and for this reason a proper investigation can be made in this matter by her canonical pastor *in ordine ad matrimonium*. The groom, on the other hand, in a great many instances will be a *vagus*, a fact already deplored by the Council of Trent,[16] by the Fathers of the Councils of Baltimore,[17] and lately by the Holy See.[17b] In support of this assumption, some

[14] Wernz, *Ius Decretalium, Ius Matrimoniale* (Romae, 1904), p. 304. footnote 270: "Qui parochus ex iure Tridentino ad validam licitamque *receptionem consensus* sponsorum pro suo iure et officio est indiscriminatim parochus *proprius unius ex sponsis*, neque parochus *sponsae* per se habet praeferentiam legitimam ad *licitam* assistentiam; at quandoque *iure particulari* uni ex compluribus parochis competentibus data est exclusiva facultas *licite assistendi* matrimonio et percipiendi iura stolae. Cfr. Instr. C. R. § 105 ... minus accurate *Schmitz* in Arch. f. k. K. t. 64, p. 233, sq. et *Schnitzer* l. c. p. 126 not. 6 iam ex *iure communi* parocho *sponsae* vindicant praeferentiam *ad licitam* assistentiam, at solidis argumentis non demonstrant..." Note that Wernz wrote this in 1904, shortly before the promulgation of the Decree "*Ne temere*".

[15] Aichner, Simon (Ep. Brixin.), *Compendium iuris ecclesiastici* (1895), § 192, not. 5.

[16] Conc. Trident., sess. XXIV, *de ref. matrimon.*, cc. 7, et 8 (Richter, p. 219).

[17] Conc. Baltimoren. II, nn. 325-340; Conc. Baltimoren. III, nn. 125-132.

[17b] S. C. C., decr. 6 mart. 1911—*AAS*, III (1911), 102; S. C. de Sacramentis, 4 iul. 1921—*AAS*, XIII (1921), 348.

prominent authors advocated, in accord with the Decree "*Ne temere*", that in case of a *vaga-bride*, the preference should be given to the groom's pastor.[18] According to the Code, however, it is always the pastor of the bride who is legally preferred. Why? The answer follows immediately herein in the subsequent No. II.

II. The Bride's Pastor Authorized in Canon 1097, § 2

Looking attentively at the opening phrase of Canon 1097, § 1, one observes that it begins with this general principle: "*Parochus autem vel loci Ordinarius matrimonio licite assistunt*". At first glance, it deals *directly* with the licitness of a pastor's or a bishop's assistance at a marriage. In fact, this canonical phrase designates both the *license* and the *licentiate* who may act as the *testis autorizabilis* in the name of the Church as witness to a lawful marriage. This *license*, however, presupposes that the *licentiate* possesses the qualities enumerated in the previous Canon 1095, § 1, especially 2°: "*Intra fines dumtaxat sui territorii . . .*", jointly with those stated in Canon 1097, § 2: "After they [the pastor or the local Ordinary] have ascertained that at least one of the parties has a domicile, or quasi-domicile, or one month's residence in the place of marriage. In case of *vagi* it suffices that they are actually staying in the place, that is to say, if one at least is a *vagus*".[19] Why all these prerequisites? The answer is, because the supreme legislator of the Church demands that at least one of the contracting parties, preferably the bride, be the subject, by reason of a relatively long sojourn, of a competent pastor or the local Ordinary. Indirectly, therefore, as safeguarding the contract, Canon 1097 deals also with *the validity of a marriage*. Moreover, when there is involved a question about a dispensation from a diriment impediment in a certain marriage, it is not only the licitness, but also the validity of a prospective mar-

[18] Vermeersch (*Monumenta* [decretum "*Ne temere*"], [4 ed., Romae, 1913], tom. IV, p. 103, footnote 1): "Canonice enim vagus esse potest qui civile domicilium habet in municipio. Plerumque tamen si vaga fuerit sponsa, iam causa aderit contrahendi coram sponsi parocho". Cf. also, Wernz (*Ius Matrimoniale*, nn. 178, 279) where he makes many distinctions and cites several authorities to this effect.

[19] Wernz (*Ius Matrimoniale*, n. 178, footnote 193) goes into a lengthy discussion about *vagi, peregrini, hospites*. Vermeersch (*op. cit.*, n. 62) and the new edition of Wernz-Vidal (V, n. 541, footnote 55), distinguish between *vagi itinerantes* (circus people, itinerants), and *vagi momentanei*, who merely have not as yet completed a month's residence.

riage which is safeguarded in advance by Canon 1097, § 2. For the validity of a dispensation from a diriment impediment issued in virtue of ordinary power, at least one of the contracting parties must be a subject of the local Ordinary according to the general laws on both jurisdiction [20] and the dispensation of diriment impediments.[21]

First, then Canon 1097, § 1 demands great diligence on the part of the pastor or the local Ordinary to ascertain whether or not they are qualified to assist at a marriage. Then, inasmuch as bishops and pastors are forbidden by divine and ecclesiastical law to lend their aid and cooperation to a sacrilegious marriage, they must be equally diligent in determining that there are no canonical diriment impediments or other defects which would render the marriage null and void. Finally, in some instances, a dispensation from a diriment impediment is needed *saltem ad cautelam*.[22] And in order that the local ordinary may issue it validly in virtue of ordinary jurisdiction, one of the contracting parties must be a Catholic and the local Ordinary's subject.[23]

Note also that the subsequent 3° of Canon 1097, § 1 insists that a non-proper pastor must obtain the *licentia* from any of the three proper pastors, that is from the respective superior or the local Ordinary of either party, by reason of a domicile, or quasi-domicile, or a month's residence. Why? To insure *directly* the licitness of that marriage, and *indirectly* also, as already indicated, its *validity* according to the canonical principles which govern Catholic marriages.

The supreme lawgiver of the Church does not define the *quiddity of the act of a priest's assistance at a marriage*. Is it the exercise of a power deriving from sacerdotal ordination? or from ecclesiastical jurisdiction? Or is it the mere function of a *testis autoriza-*

[20] Canons 201, § 1; 94; 95.

[21] Canons 1043-1055.

[22] This is the case with a doubtfully-baptized protestant when he intends to marry a Catholic party. In that case the dispensation is granted from the impediment *mixtae religionis et ad cautelam disparitatis cultus*.

[23] Can. 1043: "... locorum Ordinarii ... possunt dispensare proprios subditos ubique commorantes et omnes in proprio territorio actu degentes ..."

bilis? [24] In all the Canons under discussion it is simply called *licentia assistendi*, the legislator purposely abstaining from naming it jurisdiction or its equivalent.[25] In the pre-Code era it was called an act of a witness authorized by the Church and there is still no canonical reason for calling it otherwise.[26]

It is also noteworthy that in view of Canon 1097, § 1, 2°-3°, there are three competent pastors of the bride and three competent pastors of the groom who may assist validly and licitly at a marriage of their subjects. The same three pastors may also grant the *licentia assistendi* also to other priests, pastors and non-pastors to act in the church of the former and within the boundaries of their parish, v. g. to a religious priest from another diocese or even from another State to solemnize the wedding of his brother or sister or other relative. From which pastor preferably should the priest in this case obtain the required *licentia?* May he indiscriminately seek it from any of the three pastors of the bride or also from the three pastors of the groom? Who should be given the preference in such a perplexed question? According to the general rule laid down in Canon 1097, § 2, which outlines a stable mode of procedure, the pastor of the bride should have the preference: "*In quolibet casu pro regula habeatur ut matrimonium coram sponsae parocho celebretur*". This title of preference in behalf of the bride's pastor is also sponsored by commentators of eminent authority like Wernz-Vidal,[27] Che-

[24] Wernz (*Ius Matrimoniale,* n. 180): "Assistentia parochi in matrimonii celebratione non est actus ordinis vel iurisdictionis, sed exercitium *testis autorizabilis.* Hinc etiam concessio licentiae assistendi non est actus iurisdictionis, qua alteri vere delegatur iurisdictio ecclesiastica, sed potiore iure dicitur substitutio alterius testis autorizabilis vi facultatis a Concilio Tridentino acceptae, quae cum delegatione magnam habet similitudinem".

[25] Cf. Sipos, Stephanus, in *Jus pontificium,* XV (1935), 41-45, who wrote a very fine article on this matter.

[26] Pallavicino (*Historia Concilii Tridentini,* libr. XXII, cap. VIII, nn. 16-17), writes that the Council only after a long discussion selected this technical term calling the pastor an "*authorized witness*" and not a public notary of the church. This also is manifest from the wording of Canon 1098 which deals with a marriage in danger of death or in circumstances where no priest can assist: two lay witnesses may act in the name of the Church, providing a valid form of marriage.

[27] Wernz-Vidal *Ius Matrimoniale* (V, n. 542): "Privilegium competit parocho sponsae ut in coniugii celebratione praeferatur."

lodi,[28] Vermeersch-Creusen,[29] Génicot-Salsmans,[30] Noldin,[31] Sabetti-Barrett.[32] All these authors, however, agree that any just reason excuses from this canonical general rule and the *licentia* to assist validly and licitly may be obtained also from the groom's pastor.[33]

And it is not to be forgotten that the bishop of the diocese is the chief pastor of all the Catholics within the limits of his territory, and his cathedral "*the mother-church*" of all the churches under his jurisdiction.[34] He also is an indisputable, equivalent and canonical source of a valid and licit assistance at a marriage according to Canon 1095, § 2[35] and Canon 1097, § 1, 3°.[36] He may either assist personally or designate any priest in good standing as his competent delegate, without encroaching upon or derogating from any of the above mentioned pastors' claim to a certain marriage. And from experience one is aware that such a procedure by a bishop would be a Solomon's decision definitely settling an unfounded claim or an unpleasant controversy among pastors who insist excessively on their parochial rights. Undoubtedly, the contracting parties, their families and their friends are highly honored if the Bishop, or his Vicar General, or his Chancellor assists at a marriage.[37]

[28] Chelodi, *Ius Matrimoniale*, n. 135.

[29] Vermeersch-Creusen (*Epitome*, II, n. 401): "In quolibet casu praeferendus est parochus sponsae, sed iusta causa ab hac disciplinae regula excusat, v.g. si festa sponsalia in domo sponsi satis remota celebrentur etc."

[30] Génicot-Salsmans, *Institutiones theologiae moralis* (10. ed., 1922), II, n. 473.

[31] Noldin, *Summa theologiae moralis* (19. ed., 1929), III, n. 639.

[32] Sabetti-Barrett, *Compendium theologiae moralis* (28. ed., 1919), pp. 919-920, Q. 9.

[33] Sabbetti-Barrett (*loc. cit.*): "Ab ipsa autem norma sequenda excusat quaelibet iusta causa convenientiae vel utilitatis, imo ipsum desiderium sponsorum, si renuant coram alio parocho se sistere. Gravis ratio hic non requiritur sed simpliciter iusta".

[34] Prümmer, *Manuale iuris canonici* (3. ed., 1922, n. 356, 2): "Ecclesia cathedralis, cum sit ecclesia episcopi, censetur velut paroecia totius dioecesis aliarumque ecclesiarum matrix et caput. S. C. C. *Novar.*, 22 iun. 1895, et *Romana*, 27 aug. 1904, ad. I."

[35] Can. 1095, § 2: "Parochus et loci Ordinarius qui matrimonio possunt valide assistere, possunt quoque alii sacerdoti licentiam dare ut intra fines sui territorii matrimonio valide assistat."

[36] Can. 1097, § 1, 3°: "Habita ... licentia parochi vel Ordinarii ..."

[37] This is a case which really happened lately. The wedding was performed in the Cathedral by the Bishop himself.

III. A Just Reason For Exceptions In Particular Cases

Canon 1097, § 2 states: "In every case it shall be the rule that the marriage is to be contracted before the pastor of the bride, unless *a just reason excuses*".

Due to the fact, however, that the bride may have three concurrent pastors who have an equal right to assist at her marriage, namely by reason of the bride's domicile, or her quasi-domicile, or a month's residence on her part, the question arises: who of these three pastors should be given the preference? The answer is: that the supreme legislator is silent on this point; he does not make any distinction as to the preference; therefore, we cannot make any distinction of preference according to the well known adage: "*Ubi lex non distinguit, neque nos distinguere debemus*".

From the wording, however, of the clause, "*coram sponsae parocho celebretur*", compared with Canon 18, concerning the interpretation of the individual canons, the legislator's mind is evident: he left the choice of the proper pastor to the option of the bride, a matter which in many instances is not sufficiently understood but erroneously judged by some pastors. They assert that the last and actual residence of the bride should be taken as determining which pastor would assist at her marriage. Such a statement is not correct. On this point commentators of high authority agree.[38] Nay, it is even true that she may choose one of the three pastors available to the groom whenever a just reason warrants it. On this point also the law is clear [39] and commentators agree. The various and many *placita parochorum* on this point do not make a law.

We are now in a position to weigh the arguments in favor of the foregoing premises and to come to a satisfactory conclusion according to the well established rule: "*In tantum valent argumenta, in quantum ratio*".

Query I: What is the nature of the general rule "*coram sponsae parocho?*"

Query II: What is a just reason for exceptions in particular cases?

Query III: Does the penalty mentioned in paragraph 3 also apply to pastors mentioned in paragraph 2 of Canon 1097?

Query IV: Is it within the power of the bishop to change the "*iusta causa*" of this paragraph into a "*causa gravis?*"

[38] Cf. the foregoing footnotes 27-32.

[39] Can. 1097, § 2 evidently omitted the enumeration of the domicile, quasi-domicile, and a month's residence lest it would lead to misinterpretation of his mind, saying simply "*coram sponsae parocho*".

Ad I. The phrase, "In every case it shall be the rule that the marriage is to be contracted before the pastor of the bride," was first introduced into the Decree "*Ne temere*" which went into effect on Easter (April 19), 1908. Thence it was transferred in its entirety to Canon 1097, § 2. All authors and commentators of the Decree "*Ne temere*"[40] and of the present Canon agree that it binds only *sub levi.*[41] And there is nowhere implied in the entire Code in the texts parallel to this Canon that this particular law should be taken *sub gravi.* If the legislator wanted to enforce this particular law *sub gravi,* no doubt he would have done so as in Canon 1097, § 1, 3° and in Canon 1098, § 1, where exemption is based on "*gravis necessitas*". No law may be interpreted as being imposed under a grave sin unless it certainly exists as such.[42]

Ad II. All commentators agree that any just or reasonable (not futile and imaginary) cause constitutes a sufficient reason for departure from this rule, and the bride is at liberty to choose even one of the groom's pastors. Noldin[43] advocates any reasonable cause arising from utility, convenience or custom. So also Wernz-Vidal,[44]

[40] Cf. Vermeersch, *Monumenta* (decretum "*Ne temere*") (4. ed., Romae, 1913), tom. IV, pp. 97-106, where he cites such outstanding authorities as Wernz, Feije, Gasparri, Wernz, De Becker, etc.

[41] Cf. Clifford, "Interpretation on Canon 1097"—*The Ecclesiastical Review,* CVIII (1943), 116-125, where he also quotes several modern authors of eminent note: Wernz-Vidal, Chelodi, Payen, Ubach, Chretien, Davis, DeSmet, Carberry, Blat, Vermeersch-Creusen, Cappello, Jorio, Noldin, Génicot-Salsmans.

[42] Noldin (*Summa theologiae moralis* [20. ed., 1929], I. n. 161): "A prudenti voluntate legislatoris dependet, quam obligationem, utrum ad culpam, utrum ad poenam, an ad culpam et ad poenam, vel solum ad poenam, imponere velit". All authors agree that the following phrases denote a serious matter and a grave obligation: "severe," "districte," "sub gravi peccato praecipimus," "mandamus in virtute sanctae obedientiae," "sub interminatione divini iudicii," "si quis ausus fuerit," "sciat se esse excommunicatum"; "nefas est (in Canon 817)".

[43] Noldin (*op. cit.,* III, n. 639): "Cum enim non requiratur nisi *iusta causa,* ut parochus sponsi licite assistat, quaevis autem rationabilis causa utilitatis vel convenientiae vel consuetudinis censeatur iusta, vix unquam deerit iusta causa..."

[44] Wernz-Vidal (*Ius Matrimoniale,* V, n. 542, footnote 57): "Sufficit v. g. si sponsorum desiderio accedat rationabile aliquod motivum, puta quod parochus sponsi sit alterutrius contrahentium cognatus, quod solemnitates nuptiarum commodius peragantur in sponsi paroecia, quod iter nuptiae in eo facilius sit aggrediendum."

Vermeersch-Creusen [45] Génicot-Salsmans,[46] Nevin,[47] and Sabetti-Barrett.[48]

Let us consider some practical cases: Mary is an orphan-girl, twenty years old, working in Chicago in parish *A*, but she has always made her home with her aunt, a mother of a large family, in parish *B* in Chicago. Just lately, her aunt and her whole family moved into parish *C*, because her husband and Mary will thus reside closer to their place of employment. It is exactly thirty-one days since she moved into parish *C*, when the date of her wedding is set. The groom is a widower with two small children, but quite wealthy, having many friends and relatives in Milwaukee. He is willing to defray all the expenses of the wedding, the fares of her uncle and aunt, etc. Who could deny to Mary the privilege of choosing the groom's pastor in this case?

Anna, twenty-two years old, has her legitimate domicile in city *A*, where her parents and her whole family live. She has accepted a position of housekeeping in city *B*, where she has stayed during the last ten months with her sister, and joined St. Joseph's parish in that city. The prospective groom lives in the same city *B*, but in St. Mary's parish, just one block from her aunt's home. The final arrangements for her wedding are made. Her aunt persuades Anna to make her home with her for thirty-one days prior to the ceremony with the intention of having a fine wedding at the former's home. The aunt agrees to pay all expenses and to permit the married couple to reside with her for a few weeks until they find suitable quarters somewhere in the vicinity. Anna's father and mother also like the arrangement. Anna even takes a pew in St. Mary's church and pays pew rent for two months in advance. The

[45] Vermeersch-Creusen (*Epitome*, t. II, n. 401): "...si festa sponsalia in domo sponsi satis remota celebrentur".

[46] Génicot-Salsmans (II, n. 473): "...ac proin iusta causa convenientiae vel utilitatis excusat".

[47] Nevin, Rt. Rev. John J., in *"The Australasian Catholic Record"*, XII (1935), 262-267, who also wrote a very good commentary on Can. 1097. On page 265 he writes: "If a girl desires to be married in the parish of her fiancé she does not need the permission of her own parish priest. All the law requires is that she have, not indeed a very serious cause for her desire but, a *causa iusta*. Now people do not usually want to go away from home to get married without a motive which, from their point of view and outlook, is not unreasonable".

[48] Sabetti-Barrett, quoted already in the foregoing footnote 33.

pastors of Anna's domicile in city *A* and of St. Joseph's church in city *B* claim that is is "*in fraudem legis*" to celebrate the marriage at St. Mary's church in city *B* and deny the preference to them. Are they both right or wrong? The answer is, they both are wrong, because Anna may profit by her privilege of a thirty days' residence only and give the preference to the pastor of St. Mary's. There is a just reason for her doing so, since her aunt is willing to pay all the expenses of the wedding. Finally, there is nothing in canon law forbidding her doing so if she acts "*in fraudem legis*"; therefore, the above two mentioned pastors cannot create a prohibition of their own.

Ad III. The penalty mentioned in Canon 1097, § 3 applies only to non-pastors for assisting at a marriage unlawfully, i.e., without the permission of a proper pastor or *without that grave necessity* which excuses him from requesting such permission. It does not, however, affect any of the three proper pastors mentioned in paragraph 2 of the same canon. The reason is, because paragraph 3 refers only to non-pastors, as is evident from the entire text and context of this paragraph. On this point also commentators agree.[49]

Ad IV. First of all, the determination of a *just cause* in this matter belongs to the pastor of the bride; and, in case of controversy, to the bishop.[50] Secondly, according to canon law, a just cause is not always a grave cause, as it can be seen from the terminology employed in the cases[51] where the respective types are required. Thirdly, can a bishop change by his own interpretation the *just cause* required in our case into a *grave one*, requiring the latter rather than the former? On this question there is a division of opinion: Wernz-Vidal,[52] and Chelodi[53] attribute such power to him, while Vermeersch,[54] Cappello[55] deny him such authority. This

[49] All the authors cited in the foregoing footnotes 43-48.

[50] Canon 1097, § 2 does not *per se* call for the bishop's intervention; it is left to the bride's pastor, as is evident from the context of the entire paragraph. If there is, however, a controversy between two pastors, the bishop is the logical arbiter. In this regard we may apply the general rule: "*Nemo iudex in propria causa*".

[51] Cf. Canons 1097, § 1, 3°; 1098, § 1, where the words "gravis necessitas" and "sine gravi incommodo" occur; in our case it is only "*iusta causa*".

[52] Wernz-Vidal, *Ius Matrimoniale*, V, n. 542, footnote 57.

[53] Chelodi, *Ius Matrimoniale*, n. 135.

[54] Vermeersch, *Theologia moralis*, n. 800.

[55] Cappello, *De matrimonio* (4. ed., Romae, 1939), n. 688.

diversity of view hinges on the canonical principle: whether such an action on the part of the Ordinary is contrary to the legislator's mind and beyond the power granted him by the Code? The answer is, that the Ordinary in this circumstance does not claim any power *supra Codicem*, but gives a legitimate interpretation *iuxta Codicem in obscuris* for the good of his diocese binding until a similar declaration is issued by the Holy See. Nobody can deny to the Ordinary such particular legislation for his own diocese.[56]

IV. A General Rule for Marriages of Mixed Rites

Canon 1097, § 2 further rules: "Marriages of parties belonging to different Catholic Rites shall be contracted in the presence of the pastor of the groom and according to the ceremonies of his Rite, unless a particular law rules otherwise".

The term "pastor" is defined by Canon 451, § 1 as "the individual priest or a moral person (e.g. a monastery, Chapter of canons), to whom a parish has been given '*in titulum*' with the care of souls to be exercised under the authority of the local Ordinary." [57]

This provision of canon law on this point is very practical in the United States. Professors in our seminaries, teaching moral theology and canon law, should call the special attention of their auditors to this part of Canon 1097, § 2 so as to acquaint the candidates for the priesthood with a sufficient knowledge of the law governing the marriages of Catholics of the many and various Oriental Rites in this country.[58]

In the United States, in all the dioceses and places which were withdrawn from the jurisdiction of the Sacred Congregation of the Propaganda and placed under the general government of the Church,

[56] Cf. Crnica, A., in *Jus Pontificium*, XVIII (1938), 288: "Quis negabit, superiorem ecclesiasticum illis legibus particularibus uti posse tanquam iure suppletorio pro suis specialibus casibus? Id nemo negare potest".

[57] Cf. Woywod, in *The Homiletic and Pastoral Review*, XLI (1940), 274-283.

[58] It is a pity that in some instances professors in our American seminaries overlook this particular legislation on marriages between parties of the Latin Rite and those of Oriental Rites. Especially they who aspire to be future professors of moral theology and canon law, they who are preparing for the sacred ministry where Oriental parishes exist, and prospective missionaries should be made well acquainted with the latest two documents: S. C. pro Ecclesia Orientali, decr. 1 mart. 1929 (*AAS*, XXI [1929], 152 sqq.), and decr. 23 nov. 1940 (*AAS*, XXXIII [1941], 27).

all parishes (whether territorial or national parishes or belonging to one of the Catholic Oriental Rites), are parishes in the canonical and proper sense of the term;[59] therefore their pastors are also canonical and proper pastors to assist at marriages validly and licitly within the limits of the canons herein discussed.[60]

After the promulgation of the Decree "*Ne temere*", an answer of the Sacred Congregation of the Council[61] was and still is applicable to language parishes that have no exclusive territory of their own, but embrace the people of a certain language who live scattered in one or several English-speaking parishes. The question was: "where and how pastors could assist at marriage who have no exclusive territory of their own, but simultaneously with one or several pastors." The answer was that they could assist in the territory held simultaneously with other pastors. No other declaration on this point has been issued by the Holy See later than the above-mentioned Decree, and the commentators of the Code, even those who are best qualified to know the mind of the Holy See, like Cardinal Gasparri,[62] apply the principles of the Decree of 1908 to the Code also.[63]

In this connection we are ont so much concerned with the national parishes whose members are Catholics of the Latin Rite, as with those national and language parishes whose Catholics belong to one of the Oriental Rites, v.g. the parishes of Syrians, Armenians, Melchites, Maronites, Rumanians, Chaldeans, Ruthenian Catholics of Rusin, Hungarian, Slovak and Croatian nationality in the United States.[64] What about the marriages of these Catholics?

According to the statistics of the Catholic Directory, there are two Ruthenian Eparchies (dioceses) in this country with about 553,000 Catholics of this Rite alone. There are also some 69,000 Catholics who belong to the other Eastern Rites.[65]

[59] Can. 216, § 4; Pont. Comm., 20 maii 1923; S. C. C., 15 ian. 1938 (ad. Ap. Del.), Bouscaren, *Supplement* (Milwaukee, 1941), pp. 48-49.

[60] Cf. Sipos, S., "Possitne Latini coram parocho Orientali matrimonium celebrare?"—*Ius Pontificum*, XIX (1939), 97-99.

[61] S. C. C., 1 febr. 1908, ad VIII—*AAS*, XLI, 108.

[62] Gasparri, *De Matrimonio*, (ed. Nova, 1932), II, n. 976.

[63] Cf. Woywod, in *The Homilectic and Pastoral Review*, XLI (1940), 278.

[64] Cf. Clement C. Englert, C. SS. R., "Orientals and the Parish Priest",—*The Homiletic and Pastoral Review*, XLII (1941), 35-39.

[65] Englert, *ibid.*, p. 35; *The Official Catholic Directory* (1941), pp. 658, 662.

The two Ruthenian Eparchies (dioceses) have their own Bishops. His Excellency, the Most Rev. Constantine Bohachevsky, D.D., resident in Philadelphia, is the Ordinary for all Ruthenian Catholics of Ukrain nationality in this country. His Excellency, the Most Rev. Basil Takach, D.D., resident near Pittsburgh (St. John's Cathedral, Munhall, Pa.), is the Ordinary for all the Ruthenian Catholics of Rusin, Hungarian, Slovak, and Croatian nationality in the United States. It is to be noted that these people all call themselves Greek Catholics, because their Rite or form of worship is the Byzantine or Greek Rite. Each of these two dioceses is composed of numerous parishes throughout the United States.[66]

All other Eastern Rite Catholics (hence those not of Ruthenian Rite) are under the local Ordinaries of the Latin Rite. In several dioceses, especially in the East, their parishes are listed with the designation of the Rite to which they belong. It is also indicated that their pastor belongs to their Rite.

Concerning the initial and permanent affiliation with the Eastern Rites we must bear in mind the entire Canon 98. As a general rule[67] all children belong to the father's Rite. Therefore, to all Catholics of Oriental Rite (*those not of the Ruthenian Rite,* under the jurisdiction of one of the Ruthenian Bishops), the first clause of Canon 1097, § 2 refers, that is, their proper pastor is that of the *groom.* When contracting marriage with Latins, however, they are bound by the canonical prescriptions of form according to Canon 1099, § 1, 3°.

The phrase of Canon 1097, § 2: "*nisi aliud particulari iure cautum sit*", however, is applicable to the Ruthenian Catholics under the jurisdiction of either of the two Ruthenian Bishops mentioned above. To them refers the particular legislation for the United States "*coram sponsae parocho*"; they are further bound by the form according to the Decree "*Ne temere*".[68]

If any dispensations are required, they are to be obtained from the bishop of the bride.[69]

[66] See *The Official Catholic Directory* (1941), pp. 655-662.

[67] S. C. pro Ecclesia Orientali, decr. 23 nov. 1940—*AAS,* XXXIII (1941), 28.

[68] S. C. pro Ecclesia Orientali, decr. 23 nov. 1940—*AAS,* XXXIII (1941), 27, Art. 39: If there is a just reason, marriages may be celebrated in the rite of the man, according to the judgment and with the consent of the Ordinary of the place.

[69] S. C. pro Ecclesia Orientali, decr. 1 mart. 1929, art. 40—*AAS,* XXI (1929), 152.

V. A Compromise "*ex bono et aequo*"

It is not the author's aim to comment on Canon 1097, § 3 which rules: "The pastor who assists at marriage without the permission required by law does not become the rightful owner of the stole-fee but must forward it to the proper pastor of the contracting parties".

This paragraph refers to non-pastors who assist at a marriage of non-parishioners without the proper permission *extra casum necessitatis*. The author is interested in the present discussion only in cases where from all the circumstantial evidence and from every principle of canonical and natural equity a certain pastor should have been given the preference. These he will illustrate with a few examples of cases which may really happen.

Let us suppose that a Catholic boy from a newly established parish intends to marry a protestant girl, baptized doubtfully according to one of the protestant rites, previously married once or even twice to another protestant not baptized at all. She has her residence in the former parish of the groom's parents. The Catholic boy makes all the preparations for making a convert out of this woman. The groom's pastor, in charge of this new parish, is willing to impart the necessary catechetical instruction. He, moreover, has to make all the necessary investigations according to the latest *Normae*,[70] write to different places and to the respective protestant ministers for information, use his automobile to inquire of the civil court officials about the various civil marriages and divorce and decrees, prepare all these documents for the diocesan matrimonial court, etc.; in general, he has to make a special sacrifice of his time in order to be on time for the respective appointments. Finally the future bride is baptized conditionally or absolutely, as the case may be. The diocesan matrimonial court also issues a decree to the effect that the woman is now free to marry. But here comes a real disappointment to the zealous pastor. This couple now desires to be married in the former parish of the groom's parents, to which the latter are still attached as their former national parish, and because its church is more beautful, its altar is illuminated with elec-

[70] S. C. de disciplina Sacramentorum, *Instructio de normis a parocho servandis* etc., 14 iun. 1941, published in pamphlet form by The Jurist, II, No. 1 (January), 1942.—All Bishops, pastors and professors in seminaries agree that it is an arduous and complicated task to make all these investigations, involving loss of money and time on the part of the *proper pastor*. It is here that the gentleman's agreement fits in: "*Qui prior tempore, potior iure.*"

tricity, a prie-dieu is supplied for the couple and for the two witnesses, and all kinds of non-litiurgical additions are available. *Ad maiora mala evitanda,* this pastor gives his permission for the celebration of the marriage there, because he knows from Canon 1097, § 1, 2°, that the other pastor also may assist validly and licitly. He forwards all the necessary documents to this pastor who, in return, fails to reciprocate with any expression of appreciation for all the work performed by him.

Another case: a Catholic girl leaves her family's domicile and finds an employment in a metropolis. There she meets a protestant suitor who gets her into trouble; they marry in a hurry in the groom's protestant church. After a two year's unhappy cohabitation, she divorces him and returns home. Her parents are negligent Catholics, not contributing much towards the church. The home-pastor finds a suitable position for the divorcee; brings her parents back to church, and solves the problems arising from her former marriage. She is finally ready for a Catholic marriage, but in a territorial American parish, *ratione menstruae commorationis tantum.* The banns have been published and, without a word of notification, they are married there in parish *C*. Of course, they may do so according to the rule of Canon 1097, § 1, 2°. We are, however, concerned with natural equity "*ex bono et aequo.*" In some instances, especially in episcopal cities, our young people like to be married in the Cathedral, which is, as a rule, a rather beautiful church. Its pastor also may claim that it is *the mother-church* of all the Catholics within the diocese, and that thus he may assist validly and licitly at the marriage of any couple that comes along.[71] From experience we know that some priests will gladly accept any marriage, not asking many questions and not considering natural equity "*ex bono et aequo*"[72] They do not make an effort to persuade such couples that there is some equity neglected when they ignore their proper pastor who had to expend so much effort in straightening out various complications and in preparing all the necessary documents for their wedding.

[71] A certain bishop (somewhere in the United States) gave the pastor of his Cathedral church the following advice: "Although the Cathedral church is called the mother-church of the diocese, when there is a complication, however, concerning a marriage consider yourself a pastor like the other pastors in the diocese".

[72] The parable about the rich man (II Kings, xii, 1-7) who, having many sheep, went out and took the only sheep of his poor neighbor is often relevant in such instances.

In the larger parishes, it is usually the task of the assistant or assistants to take care of the instruction of converts and of those preparing for marriage. They designate certain appointed days and hours for this purpose. It is again here that a gentleman's agreement nicely fits in. We know that some pastors as a token of appreciation split the *iura stolae* with their assistant or assistants, although according to Canon 463, § 3 they cannot claim any reimbursement except the stipend for the wedding Mass, if they are permitted to celebrate it; since some pastors prefer to assist at all marriages in their church and also say the nuptial Mass. Of course, in virtue of Canon 1097, § 2 they have a right to do so.

As Canon 1097, § 2 states: "*nisi iusta causa excuset*", it is only just and fair that couples to be married should not be easily accepted in other parishes, but referred to their proper pastor. In many smaller and newly erected parishes, offerings made on the occasion of marriages constitute a significant part of the revenue of the parish priests. In the interest then of fairness and equity, there ought to be a regular well recognized procedure, so that pastors may not be deprived of what they reasonably and normally regard as their reward for some extraordinary work, "*saltem ex congruo*", according to the well known Scriptural text: "For the laborer is worthy of his hire".[73] And as a rule, even common people resent the idea that, without a *just and reasonable cause*, a young couple should be accepted so easily by pastors of the larger parishes with detrimental results to pastors of smaller parishes.

A perfect gentlemen's agreement, however, could be worked out in this manner: Whenever they are married by another priest, who is not the proper bride's pastor according to the universal accepted custom, let the former explain to the couple that the pastor who prepared them for the marriage and obtained all the documents is entitled to the stole fee. He may say: "I shall be satisfied with the stipend for the Mass. I want you to know that I am doing this favor to you *with a perfect understanding with your pastor.*" All three parties concerned will be satisfied: the celebrant of the nuptial Mass will have his stipend; the bride's pastor will get the rest of the offering; the young couple's alleged just cause will be recognized and their wishes based on it fulfilled.[74]

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[73] Luke, x, 7: "Dignus est enim operarius mercede sua".

[74] Cf. *Jus Pontificium*, XV (1935), 322-323, where the author of this treatise solved a similar case in the form of a "gentleman's agreement".

THE IMPEDIMENT OF *NONAGE*

A Problem in Voidable Marriages

Diocesan tribunals are frequently confronted with the problem of the validity of the marriages of the non-baptized. Particularly this problem arises in connection with cases involving the impediment of *ligamen* with the civil impediment of nonage affecting the first marriage. When both parties are non-baptized the marriage is within the competence of civil law.[1] Although the impediment of nonage in America is a diriment impediment under common law, the State of Delaware has rendered it an impedient impediment, and a cause for divorce. In forty-six other states, nonage can be recognized as a diriment impediment. The principle of common law regarding convalidation is still in effect in American civil law, whether by statutory law, as in some states, or by judicial jurisprudence, as in others. At the cessation of the impediment, the marriage is convalidated by the free and voluntary cohabitation of the parties without the necessity of an explicit renewal of consent or a second solemnization of the marriage.[2]

Of the forty-eight states, the only legislation to leave the nature of the impediment of nonage uncertain is that of New York.[3] The minimum age of legal consent for marriage in the law of New York State is established at eighteen years for both parties.[4] However, an impedient impediment is established against the marriage of a man over eighteen and under twenty-one years of age, who has not

[1] Cf. Gasparri, *Tractatus canonicus de matrimonio* (ed. nova ad mentem Codicis I. C., 2 vols., Civitate Vaticana: Typis Polyglottis Vaticanis, 1932), n. 244, ss.; De Smet, *Tractatus theologico-canonicus de sponsalibus et matrimonio* (4. ed., Brugis: Car. Beyaert, 1927), n. 433, ss.; Alford, *Jus civile matrimoniale in Statibus Foederatis Americae Septentrionalis cum jure canonico comparatum* (New York: P. J. Kennedy & Sons, 1938, pp. 14, ss.

[2] Cf. Alford, *Jus civile*, pp. 55-60.

[3] "Denique, in *New York*, ratione dispositionis peculiaris legis, utrum sit impedimentum an potius causa divortii non clare constat."—Alford, *Jus civile*, p. 58.

[4] *Domestic relations law*, § 7, subsec. 1; May, *Marriage laws and decisions in the United States* (New York: Russell Sage Foundation, 1929), p. 293; McKinney, *The consolidated laws of New York State*, bk. 14, *Domestic relations law* (Brooklyn, N. Y.; Edward Thompson Co., 1941), p. 105; Alford, *Jus civile*, p. 57.

the written consent of his parent or guardian.[5] This prohibition against the marriage of a man under twenty-one years of age without the written consent of his parents or guardians directly affects the issuance of the marriage license and does not render the marriage invalid.[6]

The issuance of a marriage license to parties under eighteen years of age is subject to various conditions. When the license is issued to a minor under eighteen years of age and over sixteen years of age, the written consent of the parents or guardians is required.[7] If the minor be a woman under sixteen and over fourteen years of age, the consent of the judge of the children's court is also required before a license can be issued.[8] The marriage of a man under sixteen years of age, or of a woman under fourteen years of age is prohibited under severe penalties in New York State.[9]

The Marriage of Minors a Voidable Marriage

Whether these restrictions upon the marriage of minors under eighteen years of age constitute a diriment impediment or an impedient impediment is not clearly apparent from the text of the law. Such marriages are classed as *voidable* marriages, and may be voided at the complaint of the minor, or of the parent or guardian of the minor, provided that the minor, upon attainment of the legal age of consent, has not ratified the marriage by free and voluntary cohabitation with the other party. The text of the law states:

> A marriage is void from the time its nullity is declared by the court of competent jurisdiction if either party thereto:
>
> 1. Is under the age of legal consent, which is eighteen years, provided that such nonage shall not of itself constitute an absolute right to annulment of such marriage, but such annulment shall be in the discretion of the court which shall take into consideration all the facts and circumstances surrounding such marriages.[10]

[5] *Domestic relations law*, § 15.

[6] *Domestic relations law*, §§ 15, 25.

[7] Pending legislation would make it unnecessary to obtain the consent of a parent or guardian who is absent from the country in the armed service of the nation.

[8] *Domestic relations law*, § 15; cf. McKinney, *Domestic relations law*, p. 98; May, *Marriage laws*, p. 291.

[9] *Domestic relations law*, § 15-a; McKinney, *Domestic relations law*, p. 98.

[10] *Domestic relations law*, § 7, subsec. 1.

Although the text of the law states that a voidable marriage " is void from the time its nullity is declared by the court of competent jurisdiction ", the jurisprudence of the courts has interpreted that a judgment of annulment in voidable marriages " operates retroactively and destroys the marriage *ab initio* ".[11]

Secondly, " the annulment is granted not as a matter of course upon proof of nonage, because of the mere desire of the parties, but the exercise of the court's discretion is dependent on the surrounding circumstances ".[12] The circumstances to be considered are age, education, religious differences, attitude of the parents, and whatever indicates that the child's inexperience has been taken advantage of, or whatever points to an unsuccessful marriage.

Finally, although the marriage of a minor under eighteen years of age is voidable upon complaint of the minor or of a parent or guardian of the minor, even when entered into with the consent of the parent or guardian,[13] the impediment of nonage does not give an absolute right to nullity. The privilege of annulment may be granted or denied in the discretion of the court. The marriage of a girl of sixteen, for instance, with her parents' consent, will not be annulled merely because of disagreements, where it is not shown that the parties cannot live together as husband and wife and properly care for their children.[14]

The Impediment of Nonage Compared with a Diriment Impediment

From this description, it appears that the impediment of nonage is not a diriment impediment in New York State Law. A diriment impediment renders a marrage invalid independently of any circum-

[11] Sealy, *Law of persons and domestic relations* (2 ed., New York, 1936), § 62; cf. *Matter of Moncrief*, 235 N. Y. 390, 139 N. E. 550; *Price v. Price*, 124 N. Y. 589, 27 N. E. 383.

[12] McKinney, *Domestic relations law*, p. 27; cf. Sealy, *The law of persons*, p. 59; May, *Marriage Laws*, p. 292. Note, this provision is an amendment to subsec. 1 of § 7 of the domestic relations law of New York State. It became effective September 1, 1922. The previous statutes allowed the nonaged party annulment of an unconfirmed marriage as a matter of right.—Cf. McKinney, *o. c.*, p. 19; May, *o. c.*, p. 292.

[13] *Domestic relations law*, § 25.

[14] McKinney, *Domestic relations law*, p. 27.

stance.[15] The civil annulment of a marriage voidable because of nonage depends upon extenuating circumstances. Moreover, a diriment impediment, considered by itself, gives the parties an absolute right to petition a declaration of nullity.[16]

Although he who is both the direct and culpable cause of an impediment is estopped from impugning the marriage bond, this disqualification is placed in the manner of a penalty for contempt of the authority of the legislator and disrespect for the sacrament, and to prevent anyone from benefitting by his own fraud. This estoppel does not arise from the impediment itself, but from an extrinsic cause, the culpability of one of the parties. The innocent party still retains an absolute right to impugn the marriage bond. Where the promoter of justice may impugn the marriage bond,[17] the marriage will be declared null on proof of the impediment. Where the impediment is evident, as in those cases enumerated in canon 1990, this restriction is not placed upon a party who is the guilty cause of the impediment. In particular, such estoppel does not affect a person subject to the canonical impediment of nonage. According to the most recent interpretation given by the Code Commission to canon 1971 § 1 1°, only he who is both the direct and the malicious cause of the impediment is estopped from impugning the marriage bond.[18] No one can be the direct cause of the impediment of insufficient age by which he is affected. This impediment arises from a physical cause over which the subject has no control. Parties to a marriage which is invalid because of the diriment impediment of insufficient age have an absolute right to petition a declaration of nullity, and, once the existence of the impediment is certainly established along with the absence of the convalidation of the marriage, to obtain such a declaration.

An annulment, however, in New York civil law, is not granted as a matter of course on proof of nonage. Such an annulment shall be in the discretion of the court to grant upon consideration of all of the facts and circumstances indicating the future success or failure of the marriage.

[15] Cf. canon 1036.

[16] Cf. canon 1971 § 1; P.I.C., *Resp.*, 27 iul., 1942—The Jurist, III (1943), 156.

[17] Cf. canon 1971 § 1 2°.

[18] P.I.C., *Resp.* 27 iul. 1942—The Jurist, III (1943), 156.

The Impediment of Nonage and Automatic Sanation

It may be argued, however, that the state in refusing to grant an annulment of a marriage where nonage affects it, is in effect granting an automatic sanation of the marriage. However, by the very fact that one of the parties has petitioned the court for an annulment, it appears that this party no longer desires to continue the marriage. Marriage consent in this case seems to have been interrupted. A sanation cannot be granted in a marriage, invalid from the beginning, when the original marriage consent of one of the parties has ceased to persevere.[19] Civil law cannot grant an automatic sanation of a marriage when one of the parties has withdrawn the original marriage consent.

Furthermore, minors may, with the consent of those specified in the law, obtain a license and contract a marriage, which later may be annulled in the discretion of the court. According to the theory that these marriages are invalid from the beginning because the impediment of nonage is a diriment impediment, and that the court issues an automatic sanation of these marriages when it refuses to grant an annulment, the law is forced into the inconvenient position of giving its sanction to a sinful union until the parties attain the legal age of consent or until the marriage is annulled. Such does not seem to be the intention of the law and of the jurisprudence. Although the annulment acts retroactively to render the marriage void from the very beginning, the New York courts hesitate to characterize a voidable marriage as invalid before the decree of annulment has been issued. "A marriage voidable under this section[20] is valid for all purposes until judicially declared void."[21] When it refuses a petition for annulment, the New York State court does not grant a sanation of a marriage hitherto invalid. Rather, the opposite is true. When an annulment is granted, a marriage hitherto valid, is *destroyed* retroactively to its very beginning.[22]

[19] Cf. canon 1139 § 1. This requirement arises from natural law—Cf. De-Smet, *De sponsalibus,* n. 736.

[20] *Domestic relations law,* § 7.

[21] McKinney, *Domestic relations law,* p. 23, n. 4; cf. *Price v. Price,* 124 N. Y. 589, 27 N. E. 383.

[22] "A judgment of annulment operates retroactively and *destroys* the marriage *ab initio.*"—Sealy, *Law of persons,* § 63. Italics inserted.

The Impediment of Nonage an Impedient Impediment Only

Finally, should any doubt remain regarding the nature of the impediment of nonage in New York State law, the principle of civil jurisprudence should be kept in mind, namely, that unless a prohibition to marry clearly affects the validity of the contract, it is to be presumed to pertain only to the licitness of the act.[23] Unless the impediment of nonage certainly renders the marriage invalid, it must be presumed only to affect the licitness of the marriage. The impediment of nonage in New York State law does not of itself render a marriage invalid. It furnishes grounds upon which an annulment may be granted; an annulment which in effect is a species of divorce, but which operates more radically than a divorce, in that it "*destroys* the marriage *ab initio*": it extinguishes the rights of the marriage from the very beginning.[24] The impediment of nonage in New York State is not a diriment impediment.

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POST-CODE OPINIONS ON THE OBLIGATION OF HERETICS TO OBSERVE ECCLESIASTICAL LAWS

Writers since the publication of the Code of Canon Law have unanimously held to the fundamental subjection of heretics to all ecclesiastical laws.[1] Van Hove states[2] that there is no one who denies that heretics are fundamentally subject to ecclesiastical laws. And the reason given by most of those just noted, and at least presupposed

[23] Cf. Alford, *Jus civile*, p. 49; cf. also canons 11 and 15 for the analogous principle in canon law.

[24] Cf. Alford, *Jus civile*, p. 43.

[1] Augustine, *A Commentary on the New Code of Canon Law*, I, 87, 88; Bargilliat, *Praelectiones Juris Canonici*, I, 62, 63, n. 70; Berutti, *Institutiones Iuris Canonici* (Vol. I, Taurini-Romae: Marietti, 1936), I, 78; Cicognani, *Commentarium ad Librum I. Codicis*, p. 95, n. 4; De Schepper, "De Haereticis Relate Ad Leges Ecclesiasticas,"—*Collationes Brugenses*, XXIV (1924), 209; Leroux, "Le Sujet Des Lois Ecclésiastiques,"—*Revue Ecclésiastique de Liège*, XVI (1924-1925), 331; Maroto, *Institutiones Iuris Canonici*, I, p. 203, n. 196; Michiels, *Normae Generales Juris Canonici*, I, 286; Van Hove, *De Legibus Ecclesiasticis*, p. 201.

[2] *De Legibus Ecclesiasticis*, p. 201.

by the others, is the reception of the indelible mark of baptism, which makes one a permanent subject of the Church, bound by all its laws.[3]

After admitting this fundamental subjection of heretics to ecclesiastical laws, many post-Code writers make the same distinctions concerning certain types of laws as proposed just prior to the promulgation of the Code.[4]

There seem to be no objectors to the opinion that heretics are actually bound by those laws which pertain to the preserving of the public order or the safeguarding of the ecclesiastical community, or which are conducive to the public good.[5] In one or the other such category are invalidating and disqualifying laws and the general laws which concern delicts and punishments,[6] and also the enactments pertaining to human acts, such as contracts, and the juridical effects of fear and of ignorance.[7]

In regard to the ecclesiastical laws that tend primarily to secure man's personal sanctification, such as those on fast and abstinence, the observance of feasts, or the prohibition of books, there is a difference of opinion. Some[8] contend

[3] Michiels, *Normae Generales,* I, 286.

[4] Let it be brought to mind here that the discussion is not about heretics who were once Catholics and left the Church. Hence, when the unqualified word *heretic* is employed in this section it does not include these persons who left the Church. Express mention of them will be made if it is necessary.

[5] Bargilliat, *Praelectiones Juris Canonici,* I, 63; Chelodi-Bertagnolli, *Ius de Personis,* p. 113, footnote 2; Cicognani, *Commentarium Ad Librum I. Codicis,* p. 95, n. 4; Claeys-Bouuaert et Simenon, *Manuale Juris Canonici,* I, 91; De Schepper, *Collationes Brugensis,* XXIV (1924), 211; Leroux, *Revue Ecclésiastique de Liège,* XVI (1924-1925), 331; Michiels, *Normae Generales,* I, 288, 289. Cf. also Onclin, *De Territoriali vel Personali Legis Indole,* Universitatis Catholicae Lovaniensis Dissertationes ad Gradum Magistri in Facultate Theologica vel in Facultate Iuris Canonici Consequendum Conscriptae, Series II, n. 31 (Gambloci: J. Duculot, 1938), p. 298.

[6] Michiels, *Normae Generales,* I, 288, 289.

[7] Cicognani, *Canon Law,* p. 566.

[8] Bargilliat, *Praelectiones Juris Canonici,* I, 63; Cicognani, *Commentarium Ad Librum I. Codicis,* p. 95, n. 4.

that the Church is presumed to act more mildly with heretics in regard to these laws and does not wish to oblige them actually in this matter. One of the reasons given is: That the Church foresees that heretics, by their contumacy, will violate these laws and multiply their sins. Hence, these authors give a benign interpretation of the will of the Church. Others[9] admit the probability of that opinion and teach that it may be held, but they attack it for various reasons.

First of all, and probably as the most important consideration, the pre-Code Law and the Code itself do not contain any positive indication of this tacit or presumed exception of non-Catholics from actual subjection to such laws.[10] Hence it is said that there is no solid canonical foundation for the distinction between laws for the public and private good.[11] Secondly, against the point raised from the multiplication of sins, it is asserted that in the majority of cases these heretics are already excused from formal sin by their ignorance or by their persuasion of immunity from such laws.[12] This, however, does not exempt them from the laws, inasmuch as there is a substantial difference between being exempted from observing a law and being excused from complying with it, either by ignorance or through some other reason, so that the material transgression does not become a formal sin.

Since it is a unique departure from the strict principles of law that would seem applicable here, further consideration must be given to this opinion that heretics are exempted, in view of the benevolence of the Church, from

[9] Cance, *Le Code de Droit Canonique* (16. ed., 3 vols., Paris: J. Cabalda et Fils, 1930), I, 49, n. 41; Chelodi-Bertagnolli, *Ius De Personis*, p. 113, footnote 2; Leroux, *Revue Ecclésiastique de Liège*, XVI (1924-1925), 332, 333; Michiels, *Normae Generales*, I, 289, 290; Van Hove, *De Legibus Ecclesiasticis*, pp. 201, 202.

[10] Michiels, *Normae Generales*, I, 289, 290.

[11] Coronata, *Institutiones Iuris Canonici*, I, p. 27, n. 14.

[12] Leroux, "Le Sujet Des Lois Ecclésiastiques,"—*Revue Ecclésiastique de Liège*, XVI (1924-1925), 329-334.

laws that pertain to man's personal sanctification. One must also keep in mind that the term "heretics" refers to those who never formally have left the Church,[13] i.e., to those who were baptized and reared in heretical sects, and perhaps to those who were born of Catholic parents and baptized in the Catholic Church and then, because of the defection of their parents, were reared and educated in heresy or schism, so that they are excused from personal guilt in being heretics.[14]

Some of the reasons on account of which the liberal opinion is rejected have just been recorded, but it is useful to examine the opinion itself more closely.

Its proponents state that the Church does not wish to bind heretics, schismatics and excommunicates because she sees that they will be contumacious in regard to these laws and the only effect of her insistence upon the principle that heretics are subject to all ecclesiastical laws without exception would be to multiply sins. Thus they say the Church would be using her power rather for destruction than edification.[15]

The argument which is drawn from the alleged multiplication of sins seems to presuppose that these heretics are not in good faith and know that they are bound by the laws in question, otherwise no formal sin would be committed by their transgression of these laws. The opposite, as noted before, contends that these heretics are either in good faith, or in a state of ignorance, or in a condition of persuasion regarding their immunity from obedience to these laws, and hence they are excused from formal sin and there is no need for a general exemption from these laws

[13] Michiels, *Normae Generales*, I, 287.

[14] Maroto, *Institutiones Iuris Canonici*, I, p. 204, n. 196.

[15] Maroto, *Institutiones Iuris Canonici*, I, p. 204, n. 196; De Angelis, *Praelectiones Juris Canonici*, Tom. I, Pars I, p. 56, n. 13; Genicot-Salsmans, *Institutiones Theologiae Moralis*, I, p. 86, n. 111; cf. also Cocchi, *Commentarium in Codicem Iuris Canonici*, I, 173.

on the part of such persons.[16] Some say that even those who remain in a non-Catholic sect through doubtful faith or even bad faith are excused from formal sin by ignorance or by the persuasion of immunity from the Church's authority.[17] It is evident that this can be true since it is possible for a heretic to be in bad faith or doubtful faith regarding the correctness of his own religious creed, but yet feel persuaded that he is not subject to the creed or the authority of the Catholic Church.

An examination of the opinion holding for exemption made in a practical manner, seems to indicate this: Most of the members of heretical denominations today know about some of these laws of the Church intended for personal sanctification, e. g., that there is such a regulation as the Lenten Fast; that Catholics are not permitted to eat meat on Fridays; that they are bound to go to Mass on Sundays and Holy Days of Obligation; and, at least with the better-educated among them, that certain books are forbidden. There is probably only a small group that is not aware of any of these laws. But do those who are cognizant of them consider themselves as bound by them? It seems that it may be said safely that the vast majority of heretics are convinced that they are not bound by the laws of the Catholic Church in view of their separation from the body of that Church. It may be safely conjectured that there are very few non-Catholics today who think that they are committing sin every time they do not comply with one of these laws—for example, every time they do not abstain from meat on Friday.

Hence it appears that this argument for the exemption of heretics by the Church because otherwise sins would be

[16] Coronata, *Institutiones Iuris Canonici*, I, p. 27, n. 14; Leroux, "Le Sujet Des Lois Ecclésiastiques," — *Revue Ecclésiastique de Liège*, XVI (1924-1925), 332; Michiels, *Normae Generales*, I, 289-290; Van Hove, *De Legibus Ecclesiasticis*, p. 202.

[17] Vermeersch-Creusen, *Epitome*, I, p. 61, n. 78; Vermeersch, *Theologia Moralis* (3. ed., 4 vols. in 3, Romae: Università Gregoriana, 1933-1937), I, pp. 253-254, n. 253.

multiplied is not based entirely on the facts of the case, for it presupposes that all or at least the majority of non-Catholics are in bad faith. This does not seem to be the case; and even if some small number of heretics is in bad faith, it does not seem that the Church should exempt them from actual subjection to her laws lest they cannot be saved by being permitted to remain in bad faith. Why should the Church have any more concern for such heretics than it has for Catholics who steep themselves in sin because of their bad faith? The Church does not exempt such Catholics from actual subjection to its laws.

The writers already cited as favoring the opinion under discussion seem to give evidence that they are referring to the multiplication of *formal* sins, for they speak of the Church as urging its laws for personal sanctification upon validly baptized heretics for their destruction rather than unto their edification.[18] But, if some of them perhaps refer to material sins, then it seems that their argument is even weaker, for the heretics would not be harmed spiritually by committing material sins, and certainly no scandal would be given to Catholics today by heretics not obeying the laws of the Catholic Church. Most of the Catholics probably never advert to the fact that validly baptized non-Catholics are still bound by the laws of the Catholic Church, and many probably do not consider any non-Catholics as bound by these laws. That these authors seem to have in mind the commission of formal sins is deducible from the counter-arguments of those who assert that heretics are excused from formal sin as long as they are in good faith or as long as they are convinced that they are not bound by the laws of the Church.[19]

The strongest argument for this benign opinion, therefore, does not seem to be its insistence on the subsequent

[18] Cf. Bargilliat, *Praelectiones Juris Canonici*, I, 63.

[19] Cf. Leroux, *Revue Ecclésiastique de Liège*, XVI (1924-1925), 332, 333; Vermeersch-Creusen, *Epitome*, I, p. 61, n. 78.

multiplication of sins, but rather that which is based on charity toward heretics,[20] if not possibly that which alleges the benefits that come from holding to this opinion, namely, the lessening of the alienation of non-Catholics who are in good faith and the obviating of many anxieties in the cases of conversion. Another point in its favor is that it has been taught for a long time openly by many important writers, without any official contradiction by the Church, and that it has not been expressly reprobated by the Code.[21]

Still, when it is considered from a strictly juridical standpoint that opinion does not have any firm foundation. But because of the weight of authority behind it, it is considered as probable and may be held in practice.[22] Hence in practice it is not necessary, when heretics are converted, to question them concerning violations of the laws of the Church in regard to the observance of Sundays and Holy Days, fast, abstinence,[23] and Catholics are permitted to cooperate with heretics who wish to perform actions that are forbidden to Catholics, e. g., to serve meat to a non-Catholic on a day of abstinence. All the adherents to this benign opinion, however, warn that Catholics are forbidden to induce non-Catholics to perform such actions either by persuading or enjoining them to do so.[24]

[20] Cavagnis, *Institutiones Iuris Publici Ecclesiastici*, I, p. 360, n. 564; ". . . . quoniam non est praesumendum Ecclesiam velle haereticos et alios heterodoxos (natos et educatos in heterodoxia), obligare ad suas leges cum certa praevisione transgressionis absque necessitate aliqua (etenim esset occasionem praebere multiplicandis peccatis, quod etsi liceat ex gravi causa, non licet ex charitate absque ea), hinc communiter et cum veritate respondetur huic quaestioni Ecclesiam non urgere leges suas quando diriguntur primario ad sanctificationem individui. . . ."

[21] Claeys-Bouuaert et Simenon, *Manuale Juris Canonici*, I, 92; De Schepper, *Collationes Brugenses*, XXIV (1924), 212, 213.

[22] Claeys-Bouuaert et Simenon (*Manuale Juris Canonici*, I, p. 91, n. 160) think that it is *communior*.

[23] Vermeersch-Creusen, *Epitome*, I, p. 61, n. 78.

[24] De Schepper, *Collationes Brugenses*, XXIV (1924), 213; Cicognani, *Canon Law*, p. 569.

There is one author[25] who holds that this opinion *ex benevolentia Ecclesiae* is based on the principle of canon 5 regarding centenary custom contrary to law. He also states that recourse is had to *epikeia* and asks: Why must the law remain in force when it is admitted that it is not to be observed?

In answer to the first argument based on centenary custom contrary to law, as arising under canon 5, it should be said first of all that if a custom did exist whereby heretics exempted themselves from the ecclesiastical laws in question it was indeed not expressly reprobated by the Code. But the next part of canon 5 speaks of contrary custom, centenary and immemorial, which may be tolerated by the bishop if circumstances are such that these customs cannot be done away with prudently. This takes in all kinds of custom whether general or particular. The question here is about a universal custom since the practice of almost all heretics is included.

In a treatment of a claim based on a contrary custom the intention required to begin a custom must not be overlooked. There are two opposing opinions as to the necessity of this intention. If the more common opinion is held that a custom contrary to the law can be introduced only by those who have the intention of establishing such a custom,[26] then it seems that heretics who have been in good faith and have not considered themselves bound by the Church's laws certainly have not introduced a custom of fact against the law, even though they have not been obeying the Church's laws for personal sanctity.[27] Those

[25] Cicognani, *Canon Law*, p. 568.

[26] Cf. Cicognani, *Commentarium Ad Librum I. Codicis*, p. 161; Chelodi-Bertagnolli, *Ius De Personis*, p. 128, n. 72; Beste, *Introductio in Codicem*, p. 95; Maroto, *Institutiones Iuris Canonici*, I, p. 269, n. 252; Cocchi, *Commentarium in Codicem Iuris Canonici*, I, p. 218, n. 135; Claeys-Bouuaert et Simenon, *Manuale Juris Canonici*, I, p. 105, n. 183.

[27] A custom of fact is formed by the frequent repetition of similar acts by a community. A custom of law proceeds from the custom of fact, that is, a law is formed by the frequent repetition of similar acts. A custom

who do not think they are bound by laws certainly cannot be said to be committing actions against them when they do not obey such laws. Hence, it does not seem that such persons can be said to have introduced a custom of fact against the law in question. If they have not introduced a custom of fact then they have not introduced a custom of law for a custom of law follows from a custom of fact when that custom of fact has the approval of the superior.

Even heretics who, though they have never been Catholics, are now in bad faith because they are convinced of their obligation of becoming a member of the Catholic Church but still remain out of it, could not introduce such a contrary custom as just noted because they would for the greater part be of the opinion that they are not bound by the Church's law since they are still not members of the Church. This is based on the fact that there are very few heretics who are aware that by the reception of valid baptism in an heretical sect they become subject to the Church's laws even though they are not members of the Church. Such persons would, therefore, be in practically the same state as heretics in good faith as far as establishing such a custom was concerned, for the intention of liberating themselves would still be lacking.

The conclusion seems to be that, even if heretics for centuries have not been obeying the Church's laws intended for personal sanctification they have not introduced a custom of fact that might be permitted to become a custom of law that would liberate them from the obligation of observing these laws since they have not had the intention of liberating themselves from these laws. It is certain that they have not introduced a custom of law because that must follow from a custom of fact. A custom of law is a custom of fact that has the sanction of the legislator.

of fact begets no obligation. A custom of law does beget an obligation for it possesses all the conditions required by the legislator and has obtained by his consent the force of law; (cf. Cicognani, *Canon Law*, p. 643).

If the opinion is held that no intention is necessary for introducing a custom contrary to the law,[28] then heretics, even those in good faith, can introduce a custom of fact by not obeying the laws under discussion. But, since a custom receives its legal force from the consent of the legislator, then the consent of the lawgiver must intervene before the usage can supplant the existing law.

It may be objected that a community that is at least capable of receiving a law is capable of introducing a custom which may obtain the force of law.[29] This is true and the community comprised of heretics all over the world may be considered as having the capacity to introduce a custom, because they are capable of receiving a law. But that capability would be restricted by the lack of intention of liberating themselves from the law, if it is admitted that such an intention is necessary for introducing a custom contrary to the law. Even if the opinion that no intention is required in this matter were followed no custom of law could arise unless the legislator gave his consent to that custom. The legislator has not given that consent and it seems as though he will not give it except for the gravest of reasons since it is the realization of their obligation to these laws for personal sanctification that will be a means of leading heretics back into the Church.

If one holds the opinion that heretics are in a state of ignorance or of good faith in relation to their apparent transgressions of ecclesiastical law, then the use of *epikeia* is not necessary to show that they are not bound to the Church's laws for the personal sanctification of its subjects. *Epikeia* is used when a person is bound to a law and knows of his obligation but has grave reasons to think that he is excused at the time from observing that law. In other words, he thinks that his particular case is not within the

[28] Cf. Guilfoyle, *Custom,* The Catholic University of America Canon Law Studies, n. 105 (Washington, D. C.: The Catholic University of America, 1937), p. 109.

[29] Canon 26.

ambit of this law.[30] It has been stated that heretics in good faith do not know of their obligation to ecclesiastical laws. How then is it possible for them to use *epikeia* to release themselves from an obligation which they think does not exist?

Against the point of some authors that the laws for personal sanctification would not be useful because they would not be observed but would be actually harmful if extended to heretics, it is noted [31] that a law is judged prudent and just, not because it is useful or adaptable to this or that person, but because it is useful and beneficial to the whole community. Hence, if it is for the good of the entire body politic, it should not be restricted to those who probably will observe it. Heretics, because of baptism, are subjects of the Church and, therefore, they are juridically bound by her laws, since the latter are conceived as being made for the universal Church including those who are separated by heresy.

Another opinion which seems to hesitate between both extremes,[32] is that the Church, in the external forum, does not urge the obligation of its laws too strongly. The fact that the Church does not urge the obligation to its laws too strongly is no indication that the Church does not still consider heretics as bound by those laws. The Church in many cases does not insist upon some of its basic rights as a perfect society, inasmuch as prudence in certain circumstances counsels another course of action. This same prudence may enter into the explanation for its not urging heretics to obey its laws. But the Church may still consider heretics as actually bound by its laws, and may still claim authority to force its subjects, even heretics, to obey

[30] Genicot-Salsman, *Institutiones Theologiae Moralis,* I, p. 97, n. 133.

[31] De Lugo, *Disputationes Scholasticae et Morales,* Tom. IV Tract. *De Sacramento Poenitentiae*), Disp. XV, Sect. VII, n. 144; Van Hove, *De Legibus Ecclesiasticis,* pp. 201, 202.

[32] Berutti, *Institutiones Iuris Canonici,* I, 78.

its laws.[33] Today, however, it uses only certain spiritual punishments against heretics as will be noted in the penal section of the Code.[34] It does not, of course, use such punishments for violations of laws such as the one requiring fast and abstinence on certain days.

In regard to ecclesiastical laws which prescribe certain determined acts for subjects of the Church but which non-Catholics are prohibited from performing, e. g., the laws of annual confession and Paschal Communion and the law regarding the hearing of Mass on Sundays and Holy Days of Obligation, some authors, though maintaining in general that heretics are not directly exempt from laws looking to personal sanctification,[35] hold that non-Catholics are exempted from them indirectly (*per accidens*).

It is to be noted that these examples cannot be classed as strictly ecclesiastical laws, since they are based very directly on divine laws. They are ecclesiastical only insofar as the Church has determined the exact times at which the divine commands are to be obeyed. It has enacted them in order to make sure that Our Lord's commands in these matters are carried out.

Michiels[36] states that it seems that this opinion is to be rejected entirely, for the prohibition which touches non-Catholics in these cases does not in any way remove the obligation, but simply shows their unworthiness and indicates that they should remove this unworthiness in order that they may perform these acts rightfully and legitimately. This seems to be correct as far as general principles are concerned, for the obligation depends fundamentally upon the indelible mark of valid baptism, and

[33] Cappello, *Summa Iuris Publici Ecclesiastici* (3. ed., Romae: apud Aedes Universitatis Gregorianae, 1932), II, p. 357, n. 362.

[34] Cf. Canons 2314-2319.

[35] Cicognani, *Commentarium Ad Librum I. Codicis*, p. 95; cf. De Schepper, "De Haereticis relate ad Leges Ecclesiasticas,"—*Collationes Brugenses*, XXIV (1924), 211.

[36] *Normae Generales*, I, 288.

since that can never be erased, neither can the consequent obligation be taken away. The actual obligation is also present inasmuch as no express exemption has been made. And this is what Michiels intimates, even though indirectly the obligations cannot be fulfilled inasfar as those persons are no longer actual members of the Church.

By a *reductio ad absurdum,* Michiels [37] shows that from the above opinion, which he rejects, exemption would be proved for Catholic excommunicates, infamous persons and the publicly unworthy, who also are kept from receiving Holy Communion [38] until they are reconciled to the Church.

A summary of the preceding study will show that the principle of heretics being both *fundamentally* and *actually* bound even to purely ecclesiastical laws unless they are expressly exempted is upheld by important authors.[39] This principle applies even to those heretics who were baptized and educated in non-Catholic sects and are in good faith. It also applies to other heretics who may be in good faith. The question is superfluous as to those who left the Catholic Church to become heretics.

The opinion that heretics are not bound to obey those ecclesiastical laws that pertain to personal sanctification may be held in practice.[40]

JOSEPH A. MCCLOSKEY

PHILADELPHIA, PA.

[37] *Normae Generales, loc. cit.*

[38] Canon 855, § 1.

[39] Coronata (*Institutiones Iuris Canonici,* I. p. 27, n. 14) expresses the opinion most succinctly: ". . . . Codex supponit omnes valide baptizatos legibus Ecclesiae ligari; quare nullo solido fundamento canonico nititur distinctio ab aliquibus fieri solita circa leges bonum publicum aut bonum privatum respicientes, excusando ab his haereticos et schismaticos in bona fide educatos. Summum concedi poterit istos excusari ex ignorantia; nisi specialis exceptio probata . . ."

[40] De Schepper, "De Haereticis relate ad Leges Ecclesiasticas," *Collationes Brugenses,* XXIV (1924), 213.

APPLICATION FOR ADMISSION TO RELIGIOUS INSTITUTES OF WOMEN *

1. First and Middle Names Family Name (please print)	(Not to be marked by applicant.) 2. Religious Name

APPLICATION FOR MEMBERSHIP IN THE RELIGIOUS CONGREGATION OF THE ..... (name of institute)

Personal Origins

3. ....
Your address—Street Town—State Parish How long resident there

4. ....
Date of birth Where born (Town—State) Citizenship

5. ....
Date of baptism Where baptized (Parish—Town—State)

6. ....
Date of Confirmation Where confirmed (Parish—Town—State)

Family

7. ....
Father's name Address Religion Occupation

8. ....
Mother's (Maiden) name Address Religion

9. ....
Date of parents' marriage Where parents married (Parish—Town—State)

10. If either parent is dead, please indicate cause of death, age at time of death, date and place of death:

11. If father is a Catholic of Oriental rite, or, if father is a non-Catholic and mother is a Catholic of Oriental rite, please specify Oriental rite:

* Prepared by Rev. James B. Roberts, J.C.D., of the Archdiocese of New York.

12. If student is living separately from surviving father, please explain why:

13. If you are under care of a guardian other than parent, please furnish guardian's name, address, occupation, religion:

14. Please list all brothers and sisters who survive, indicating:

Name	Address	Religion	Occupation	Age

Education

15. Please indicate all schools you attended, the calendar years of your attendance at each and the highest grade you successfully completed in each:

NOTE: If an answer will occupy more space than the form provides room under the question, the words "refer to attached" fill in answer on a separate sheet, being careful to number the answer and sign it, and attach the sheet to the application form.]

16. If you have received an academic degree, standing or other certificate, etc., please indicate degree or certificate earned, the institution conferring same and the year in which conferred:

17. Are you employed? Please give name of firm, type of business, duration of your employment there, type of work you do:

18. Please describe any other professional or business experience, giving names of firm(s), type of business, duration of your employments and positions held:

19. Please describe any trade or skill at which you are qualified:

20. Do you read or speak any language besides English? Which:

Health

21. Have you ever had a serious operation, illness of more than one month's duration, accident or injury? If so, please specify which, describe the nature thereof, date of onset or occurrence, as of what date recovered, by whom necessary was rendered.

*22. Have you ever attended a hospital, sanitarium or similar institution for observation, examination or treatment? If so, please indicate which institution, date of admission, duration of stay, diagnosis and nature of treatment.

*23. Have you ever been told you have or had heart trouble, high blood pressure, disease of the arteries, epilepsy, nervous disorder, rheumatism? If so, please give details.

*24. Have you ever been told to have an X-ray or electrocardiographic examination or blood sugar tolerance test? If so, please give details.

*25. Have you or had your father, mother or any brother, sister or member of your household ever afflicted with tuberculosis, diabetes, specific lesion caused by syphilis, or any of the diseases generally regarded as hereditary? If so, please give details.

*26. Have you any physical or mental defect or infirmity? If so, please give details.

*27. Have you during the past year received or been closely associated with any person suffering from tuberculosis or contagious disease?

Morals

28. Is this application made entirely of your own free will and good reasons?

29. What counsel have you had regarding your choice of the religious life and of this institute in particular?

30. Why do you wish to become a religious?

31. Why do you wish to enter this particular institute?

32. What priest(s) recommended(s) you? Please furnish their names, addresses, and indicate how long they have known you and what opportunity they have had to observe your qualifications?

*Questions 22-27 are illustrative only. Each institute should secure a competent physician to devise a complete questionnaire suited to its experience and circumstances.

33. Are any of the Sisters of this institute acquainted with you? Which Sisters:

34. Are the Sisters of any other institute acquainted with you? Please furnish the names and addresses of these Sisters and describe how long they have known you and what opportunity they have had to observe your qualifications:

35. Do your parents (guardian) approve or disapprove your application for membership in this community:

IMPEDIMENTS

36. Did you ever give up your belief in any of the doctrines or your practice of the Catholic Faith; did you join any non-Catholic denomination? If so, please give details:

37. Did you ever marry or plan to marry? Were any children born to you? Do they or any of them survive? If so, please give details:

38. Have you ever sought admission to or been a postulant, novice or professed religious in any other community. If so, please give details:

39. Are you involved or in danger of being involved in legal proceedings of any kind in any jurisdiction? If so, please give details:

40. Are you liable for any debt or for any accounting of administration of business or affairs of others? If so, please give details:

41. Is any one dependent on you for support? If so, please indicate who and what plan is to be adopted for the support of this (these) person(s):

42. Is there any likelihood that your parents or another to whom you would be obligated will eventually become dependent on you for support?

ATTESTATION **

The undersigned applicant, being conscious of the serious obligation incumbent on her to represent her condition truly and com-

** This form is designed to afford a maximum of protection to the institute, but other considerations may dictate its modification for practical purposes.

pletely to the officials of the religious congregation of the ....(name), and aware that their judgment of her fitness for admission to membership in the congregation will be influenced by the information herein furnished, certifies to them, that each and all the answers given above in this application or attached thereto are, to the best of her knowledge and belief, the truth, the whole truth and nothing but the truth, and recognizes that a deliberate falsehood, misrepresentation or equivocation in these answers, which would materially affect the judgment of and mislead the officials of the aforesaid religious congregation into acting favorably on this application, would afford these officials and their successors in office cause for action before competent ecclesiastical authority, either for the annulment of any subsequent profession of vows made by the applicant or for the rescinding thereof on the basis of fraud, according to the nature and subject matter of the falsehood, misrepresentation or equivocation, and that such annulment or rescission,† if declared or decreed by ecclesiastical authority, would entail her expulsion from membership in and residence with and terminate her maintenance by the aforesaid religious congregation.

The undersigned presents this application, therefore, on the basis of representations made by her in the foregoing and attached answers, and respectfully requests that, in accordance with its rules and practices and if she be judged worthy, she be admitted to membership in the religious congregation of the .....(name).

In acknowledgment whereof applicant on this .... day of the month of ..... in the year 19... affixes her signature in the presence of the undersigned witnesses:

.....
Signature of applicant

.....
.....
.....
} Witnesses

† Reference is made to rescission because of the difficulties attendant on demonstrating *dolus*.

Below this line NOT to be marked by applicant

DOCUMENTS TO BE FILED

Baptism certificate (ans. 5) . ( )
Confirmation certificate (ans. 6) ..... ( )
Parents' marriage certificate (ans. 9) ..... ( )
School and training records as in answers 15-20, to extent Superioress directs ..... ( )
Report of examinations by:
Applicant's dentist ..... ( )
Applicant's physician .... ( )
Community's physician... ( )
Other reports to extent Superioress directs on answers 21-26 ..... ( )
Recommendations:
Priest (ans. 32) (identify) . ( )
Priest (ans. 32) (identify) . ( )
Others (anss. 33-34 (identify) ..... ( )
Others (anss. 33-34 (identify) ..... ( )
Other investigations ordered by Superioress:
(identify) ..... ( )
(identify) ..... ( )

NOTE: Put check in corresponding bracket when document is filed.

*** IMPEDIMENTS

Age (defect-excess) (ans. 4)..... ( ) ( )
Difference of rite (ans. 11) ..... ( ) ( )
Duress-Fraud (ans. 28-31) ..... ( ) —
Apostacy (ans. 36)..... ( ) ( )
Matrimony (ans. 37)... ( ) ( )
Religious profession (ans. 38) ..... ( ) ( )
Liability (ans. 39-40) .. ( ) —
Dependents (anss. 41-42 ..... ( ) —

(NOTE: put check in inner bracket corresponding to any impediment discovered; put check in outer corresponding bracket if dispensation is obtained. Consult diocesan Chancery on impediments.)

*** The Constitutions of some institutes establish additional impediments, and there are impediments of the general law, which affect only those destined for the Priesthood. These are not referred to here.

I have checked the above list, and find that all necessary documents are filed, that all appear to be authentic, that each clearly refers to the applicant and that none has been altered in any way.

.....
Mistress of Novices

I have checked the answers given by the applicant, and all other sources of information, and find that:
there appears no impediment
there appears the impediment
of .....

.....
Mistress of Novices

Decrees and Decisions

CANONICAL

ALLOCUTION OF THE HOLY FATHER TO THE AUDITORS OF THE ROMAN ROTA, OCTOBER 1, 1942.[1]

[*On the Moral Certainty required in Judicial Processes*]

Canon 1869, § 1, requires moral certainty for the judge's verdict. But moral certainty admits of degrees. Absolute certainty excludes all doubt as to the truth of a fact. It is often unattainable; to demand it, therefore, would be unreasonable; it would be an intolerable burden obstructing justice. On the other hand, mere probability or quasi-certainty, which is marked by a grounded fear of error, though often called certainty in common speech, does not afford a sufficient basis for a verdict. But in the latter case the law provides the judge with obligatory rules in which presumptions and favors of law are controlling elements. However, when certainty in the true sense is present, resort to these presumptions and favors of law would not be permissible and would constitute a misinterpretation of the mind of the legislator.

Between the extremes of absolute certainty and quasi-certainty lies moral certainty. It is such that it excludes any well founded or reasonable doubt, but not the possibility of the contrary. It would suffice for a judicial verdict, even though in an individual case, it might be possible to reach absolute certainty.

Moral certainty can sometimes be attained only by the accumulation of a number of indications and proofs, none of which singly would suffice to produce it. This attaining of moral certainty must be distinguished from a mere adding of probabilities. It is based on a process in which it is recognized that the simultaneous presence of the various proofs points to a common source.

[1] *Acta Apostolicae Sedis*, XXXIV (1942), 338. The editors present a summary of the allocution herewith.

Subjective certainty never suffices, that is, a certainty based merely on the subjective opinion or even credulity, inexperience, or lack of reflection of an individual. To secure the objectivity of moral certainty, procedural law lays down definite rules regarding investigation and proof. Certain proofs are required; others are held insufficient. Special officers of the court are appointed to assert and defend particular laws or facts. Therefore the rules of this formalistic procedure must be observed conscientiously, though the judge must bear in mind that they are not ends in themselves, but means to an end. If observance of formal procedure should become transformed into injustice or inequity, recourse is open to the legislator.

First place in modern procedure is held therefore not by juridical formalism, but by an untrammeled appraisal of proofs. Should they seem to be in conflict, the judge dare not say that he has moral certainty personally but not juridically. Rather he should examine the case more closely. The conflict may arise from an inadequate coordination of single aspects of the case to the whole case or from a misinterpretation or a misapplication of the rules of procedure.

The judge may be satisfied with the lowest degree of moral certainty, that which excludes all reasonable doubt concerning the truth, provided that it is objective, and provided that the law or the unusual importance of the case do not require a higher degree.

SACRA PAENITENTIARIA APOSTOLICA

(Officium de Indulgentiis)

Decretum

Indulgentia Plenaria Conceditur Piam Invocationem Recitantibus Aerearum Incursionum Tempore [1]

SSmus D.N. Pius div. Prov. Pp. XII, paterna caritate gregis Sibi commissi saluti semper intentus, preces quorumdam fidelium, qui hisce temporibus ob aereas incursiones in vitae discrimine versantur, libenter accipiens, in Audentia infra scripto Cardinali Paenitentiario Maiori die 19 vertentis mensis concessa, benigne elargiri dignatus est ut christifideles omnes, qui, quotiescumque civitates aliaque loca aereae incursiones aggrediuntur, saltem contriti cum vero amoris in Deum et suorum peccatorum doloris actu, invocationem " Iesu, mis-

[1] *Acta Apostolicae Sedis,* XXXIV (1942), 382.

erere mei", quavis lingua redditam (v.g. Gesú mio, misericorida—Mon Jésus, miséricorde—My Jesus, mercy—Mein Jesus, Barmherzigkeit), devote recitaverint, Indulgentiam plenariam consequi valeant.

Praesenti valituro tantum hoc bello durante. Contrariis quibuslibet minime obstantibus.

Datum Romae, e S. Paenitentiaria Apostolica, die 23 Decembris 1942.

✠ N. Card. Canali, *Paenitentiarius Maior.*

L.S. S. Luzio, *Regens.*

Proscriptiones Librorum
a Suprema Sacra Congregatione Sancti Officii
Acta Apostolicae Sedis, XXXIV (1942)

Une école de de théologie: Le Saulchoir (p. 37)—retraction by author, M. D. Chenu (p. 148); *Essai sur le problème théologique* (p. 37)—retraction by author, L. Charlier (p. 148); *Gebet, Vorsehung, Wunder* (p. 100); *Storia del Cristianesimo* (p. 375).

The Sacred Congregation of the Holy Office has placed on the Index of Prohibited Books *Christliche Einheit im Zeichen des Kreuzes*, by Johannes Stephanos.

PONTIFICIA COMMISSIO
AD CODICIS CANONES AUTHENTICE INTERPRETANDOS[1]
RESPONSA AD PROPOSITA DUBIA

EMI PATRES PONT. COM. AD CODICIS CANONES AUTHENTICE INTERPRETANDOS, PROPOSITIS IN PLENARIO COETU QUAE SEQUUNTUR DUBIIS, RESPONDERI MANDARUNT UT INFRA AD SINGULA:

I—De Delegato Episcopali quoad matrimonia

D. An Delegato episcopali, cui conceditur facultas delegata ad universitatem negotiorum iuxta canonem 199 § 1, hoc ipso concessa intelligatur vel saltem concedi possit delegatio generalis ad assistendum matrimoniis, attento canone 1096 § 1.

R. Negative.

[1] *Acta Apostolicae Sedis*, XXXV (1943), p. 58.

II—De Curatore Dementis

D. I. Utrum vi canonis 1651 § 1 ad curatorem dandum iis, qui rationis usu destituti vel minus firmae mentis sunt, requiratur regulare iudicium, an sufficiat decretum Ordinarii, praevia eiusdem prudenti inquisitione.

II. Utrum denuntiatio citationis et communicatio sententiae, de quibus in canonibus 1712 et 1877, fieri debeant ipsi rationis usu destituto aut mente infirmo, an eorundem curatori legitime constituto.

R. Ad I et II: Negative ad primam partem, affirmative ad secundam.

Datum Romae, e Civitate Vaticana, die 25 mensis Ianuarii, anno 1943.

Card. M. Massimi, *Praeses.*

L.S. I. Bruno, *Secretarius.*

The Most Reverend Apostolic Delegate has received faculties from the Supreme Sacred Congregation of the Holy Office by which he may authorize the institution of the process *super matrimonio rato et non consummato* when the petitioner is not a Catholic.

SECULAR

FREEDOM OF RELIGION IN THE COURTS

Reference was made in The Jurist (III [1943], 333, 334), to the decisions of the Supreme Court of the United States in the matter of the flag salute and the peddling of religious literature as affecting Jehovah's Witnesses. Since that time, the Supreme Court has reconsidered and reversed its decisions on both counts.

On June 8, 1942, the Supreme Court upheld the right of town governments to exact a license fee for peddlers (cf. The Jurist, II [1942], 312; 62 S. Ct., 1231, 316 U. S. 584. The rearguing was based on writs of certiorari to the Supreme Courts of Alabama and Arkansas, and on appeal from the Supreme Court of Arizona. The cases were heard with *Murdock et al. v. Commonwealth of Pennsylvania* (involving the City of Jeannette), on a writ of certiorari to the Superior Court of Pennsylvania (cf. 149 Pa. Superior Court 175). Justice Byrnes had concurred in the opinion of June 8, 1942. His

concurring colleagues constituted the dissenting group when the decision was vacated on May 3, 1943: Justices Roberts, Jackson, Frankfurter and Reed. In the Murdock decision, Justice Douglas wrote the majority opinion. It makes the following points. The fourteenth amendment of the Federal Constitution makes the first amendment applicable to the States. The spreading of religious beliefs by visitation and the distribution of literature is an acknowledged method of evangelism entitled to protection under the constitutional provision for religious freedom. A state can not prohibit the distribution of handbills, if they are not commercial handbills but offered in pursuance of religious activity, even if they invite the purchase of books promoting an understanding of religion or if they result in the raising of funds for religious purposes. The sale of religious literature does not change evangelism into a commercial enterprise. The playing of phonograph records expounding views on religion was a religious and not a commercial venture. The power to tax the exercise of a privilege on the part of a State is the power to suppress its enjoyment; and a State may therefore not impose a tax on the enjoyment of a right granted by the Federal Constitution. It is not sufficient that the tax was non-discriminatory; the freedom of religion enjoys a preferred position. Such a tax is a violation of the Federal Constitution unless the fee is a nominal one, imposed as a regulatory measure to defray the expenses of protecting citizens against the abuse of solicitors. Reference was made to *Cox v. New Hampshire* (312 U. S. 569, 61 S. Ct. 762; cf. THE JURIST, I [1941], 364) and the *Chlapinsky v. New Hampshire* (315 U. S. 568, 62 S. Ct. 766), and it was explained that in these cases special problems were presented with which the police power was held by the Supreme Court as competent to deal, i. e., State regulation of the streets to protect and insure the safety, comfort, or convenience of the public.

The same decision as in the Murdock case was reached on similar circumstances in *Martin v. City of Struthers, Ohio*, and *Douglas v. City of Jeanette et al.* These decisions were also handed down on May 3, 1943.

On June 14, 1943, the Supreme Court reversed the decision in *Minersville School District v. Gobitis* (310 U. S. 586; cf. THE JURIST, I [1941], 32-39), rendered in 1940. The present decision was reached by a vote of six to three: Justices Black, Douglas, and Murphy, changing their position from that of the previous decision.

Chief Justice Stone, who was the single dissenting Justice on the previous occasion, was among the majority in the present decision. Justice Jackson wrote the opinion in the case, appealed from the District Court of the United States for the Southern District of West Virginia. In his opinion he stated that to compel members of a sect or their children to salute the flag would be to say that a bill of rights which guards the individual's right to speak his own mind left it open to public authority to compel him to utter what is not in his mind. Justices Frankfurter, Roberts, and Reed dissented.

Justices Black and Douglas explained that they consented to the decision in the Gobitis case lest the Federal Constitution be made a rigid bar against State regulation of conduct inimical to public welfare. The principle is sound, they said, but long reflection convinced them that it should not have been applied in the Gobitis case inasmuch as the statute compelling the flag salute failed to afford full scope to the freedom of religion.

On March 16, the Supreme Court of the State of Washington, by a five to four decision, held unconstitutional the 1941 statute which permitted the pupils of private and parochial schools to ride in public school buses. Argument was made in January and briefs filed defending the statute's constitutionality by Most Rev. Gerald Shaughnessy, S.M., D.D., Bishop of Seattle, by Most Rev. Charles D. White, D.D., Bishop of Spokane, and by the Attorney General of the State. The brief of the latter made the point that the bus service is supplied to the pupils directly and not through the private or the parochial schools and that such aid, aiming at promoting the health and safety of all children attending all schools, can not be said to advance unconstitutionally religious worship and instruction. Such a narrow construction of the constitutional restriction would forbid children to walk on the sidewalks on their way to school. The opposition claimed that the following sections of the constitution were contravened by the statute. 1—" The entire revenue derived from the common school fund and the state tax for common schools, shall be exclusively applied to the support of the common schools." 2—" All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." 3—" No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment."

To the argument that since the children were required to present themselves for transportation along the route over which the bus is operated and that consequently no added expense was incurred by the state, the court replied that there could be no doubt that every additional passenger meant additional expense, even though small in the individual case. The court further held that the subsidy was given not only to the pupil but to the school, inasmuch as the free transportation of pupils induces attendance at the school.

The dissenting opinion criticized the majority opinion for its treating lightly current legal authority. It said that no man, even one bitterly opposed to the parochial school, would hesitate to give a child a ride in his own private car even though the child was going to the parochial school; nor would he think that he was aiding the parochial school in so doing. A separate dissenting opinion was filed by Justice Mallery, who maintained that the majority opinion confused the idea of benefit with the constitutional word, "support". The fire department protects the parochial school, but does not "support" it. He argued that the majority opinion had laid down an erroneous rule of law in stating that if the transportation of private or parochial school pupils is a benefit to the school, it is immaterial, and beside the question, that it is also of some benefit to the pupil; he asserted, on the other hand, that the correct rule should be that if the pupils derive a benefit from the transportation, any benefit to the private or parochial school is beside the question, unless, of course, the benefit is also a "support" of the school.

A petition for a rehearing, made by the Attorney General's office, was denied on the basis of the language of the petition rather than of the constitutional questions involved.

* * * *

A bill passed by the Senate of the State of Ohio strengthened the State laws touching the distribution of obscene literature by increasing the penalty from a fine of fifty dollars to a minimum fine of two hundred dollars and a maximum of seven years imprisonment. It makes it obligatory on magistrates to issue search warrants upon a request supported by an affidavit and places outlying districts lacking a law enforcement agency under the jurisdiction of the county courts. The measure also provides against bootlegging by truck.

The Supreme Court of South Dakota rendered a decision on May 28th in an amicable suit against the school district of Yankton instituted under the auspices of the Knights of Columbus, affirming a decision of the Yankton County circuit court, and holding that the distribution of textbooks by the auditor or county superintendent is made to the several school districts within the county and not directly to the pupils, and the cost is charged to and paid by the respective district, no provision being made whereby any pupil may acquire such books free or otherwise. The constitution, the opinion said, made no provision for distribution to private, sectarian, or parochial schools.

* * * *

The Administrative Board of Bishops of the National Catholic Welfare Conference, through Rt. Rev. Msgr. George Johnson, director of the Educational Department, N.C.W.C., has communicated to Senator Elbert D. Thomas, of Utah, Chairman of the Senate Committee on Education and Labor, its opposition to Senate Bill 637: "A Bill to authorize the appropriation of funds to assist the States and territories in more adequately financing their system of public education during emergency and in reducing the inequities of educational opportunities through public elementary and secondary schools." The measure would call for an appropriation of $200,000,000 to pay the salaries of teachers to keep schools open, to employ additional teachers, to relieve overcrowded conditions and to raise sub-standard teachers' salaries in line with the cost of living. It would also provide that $100,000,000 be appropriated annually. The latter appropriation is of a permanent nature, which Msgr. Johnson said the people should not be asked to face in the midst of a war. He also indicated that a federal agency is implicit, if not explicit, in the bill. He pointed to the additional burden of unequal taxation it would impose on Catholics who maintain their own system of parochial schools. Finally, he concluded, "The Catholic position is one of opposition to any measure for federal aid to education that would a) interfere with local control of the purposes and processes of education, and b) fail to make mandatory the inclusion of Catholic schools in its benefits."

* * * *

A bill providing a waiting period of three days between the application for and the issuance of a marriage license in Missouri has passed the State Senate.

In a suit brought by the " Gospel Army " contesting efforts of the City of Los Angeles to collect a license fee and require the posting of bonds both for organizations and their solicitors engaged in fund raising or the collection and disposal of scrap material, Superior Court Judge Harold B. Jeffrey adverted to the fact that in the individual case there might be facts that might seem to warrant such an ordinance, as when the purpose of the organization seems primarily the livelihood of its members, but maintained that the sporadic case did not warrant trespass upon the rights of religious organizations safeguarded by the first and fourteenth amendments to the Constitution of the United States.

* * * *

A bill permitting hospitals and physicians to prescribe contraceptives for married women, passed by the House, was defeated by the Connecticut State Senate, 24 to 11. Among the opponents were both women Senators.

* * * *

Governor Earl Warren of California signed in May the McMillan Bill permitting pupils in public schools to be excused from school with the written consent of their parents and the approval of the school board, to receive religious instruction. The law became effective July 1.

* * * *

Attorney General Nathaniel L. Goldstein of New York, holds, in an opinion addressed to the New York State War Council, that State funds allocated to child care projects can not be distributed to the latter if they are conducted in the same structure as any school wholly or in part under the control or direction of any religious institution, though mere ownership of the building by a religious corporation would not act as an obstacle.

* * * *

New regulations have been issued by Postmaster General Walker under which a publication whose second class permit has been revoked can not recover postage spent in sending copies under a temporary permit at a higher rate; such a temporary permit, with the privilege of reimbursement, is still available to new applicants. A further provision provides for a hearing board to be appointed in each case by the Postmaster General when there is serious question of the qualifications of the publication. The decision of the board may be appealed to the courts. Under the postal laws as enacted by Congress, the second class privilege can not be revoked without a hearing.

Reviews of Periodicals

Philosophy of Law and Government

J. Viñas Planas, "El arbitraje internacional en los escolásticos españoles"—*Ciencia Tomista,* LXII (1942), 259-273 (studies the concept of international arbitration and its difference from mediation in the writings of Báñez, Suárez, Vitoria, Soto and other Spanish theologians; to be continued).

V. D. Carro, "La distinción del orden natural y sobrenatural según Sto. Tomas y su transcendencia en la teología y en el derecho"—*ibid.,* 274-306.

H. F. Tilbier, "The Philosophy of American Patriotism in the Present Crisis"—*Ecclesiastical Review,* CVII (1942), 428-439 (on Catholic duties towards the country in the present crisis and on the dangers of this war for mankind and for Christianity).

P. L. Gregg, "The Pragmatism of Mr. Justice Holmes"—*Georgetown Law Journal,* XXXI (1943), 262-295.

H. Cairns, "Plato's Theory of Law"—*Harvard Law Review,* XLVI (1942), 359-387.

M. Radin, "A Short Way With Statutes"—*ibid.,* 388-426 (on interpretation of Statutes by the courts in the course of Anglo-American legal history; with general observations and bibliographical notes on the theory of juridical interpretation).

Ray A. Brown, "Fact and Law in Judicial Review"—*ibid.* (1943), 899-928 (analyzes and criticizes the pragmatic principle which denies any essential difference between determinations of fact and determinations of law, substituting for it a merely pragmatic test particularly in reviewing administrative actions; the author concludes that this principle might lead to an abandonment of judicial review in all but procedural questions).

W. W. Cook, "An Unpublished Chapter of the Logical and Legal Bases of the Conflict of Laws—*Illinois Law Review,* XXXVII (1943), 418-424 (a pragmatic approach to the fundamental problems of the Conflict of Laws).

E. Hexner, "The Timeless Concept of Law: Observations on Hans Kelsen's Law and Peace in International Relations"—*Journal of Politics,* V (1943), 48-64.

A. H. Pekelis, "Legal Techniques and Political Ideologies"—*Michigan Law Review,* XLI (1943), 665-692.

Miriam Th. Rooney, Book review—*New Scholasticism,* XVII (1943), 70-76 (a comprehensive critical study of recent publications on Sociology of Law: Ehrlich [transl. Moll, 1936], Timasheff [1939], Gurvitch [1942]).

A. H. Chroust, "Hugo Grotius and the Scholastic Natural Law Tradition"—*ibid.,* 101-133 (shows that the common appraisal of Grotius as having divorced

Natural Law from Theology is based on a misrepresentation which Samuel Pufendorf [1632-1692], imbued with contempt for scholastic philosophy, gave of Grotius' doctrines; in truth, the latter directly depended upon Thomistic tradition).

W. R. Watkins, "Jurisprudence and Contemporary Psychology"—*Notre Dame Lawyer,* XVIII (1942), 1-21.

L. Marceau, "The Relation of Natural to Positive Law"—*ibid.*, 22-35.

A. H. Chroust, "The 'Common Good' and the Problem of 'Equity' in the Philosophy of St. Thomas Aquinas"—*ibid.,* 114-118; "Aristotle's Conception of 'Equity' (*Epieikeia*)"—*ibid.,* 119-128.

R. N. Wilkin, "Judicial Order Fundamental for Peace"—*ibid.*, 129-136.

H. J. Paton, "Justice Among Nations"—*Philosophy,* XVII (1942), 291-303.

W. R. Inge, "The Philosophy of the Wolf State"—*ibid.*, XVIII (1943), 6-16.

M. Adler and W. Farrell, "The Theory of Democracy"—*The Thomist,* VI (1943), 49-118 (continued).

Legal Education

M. Marina Martín, "La formación del jurisconsulto"—*Razón y Fe,* CXXVI (1942), 462-476 (on the integration of juridical training by philosophy, humanities, history of law, sociology and economy).

A. Bea, "The Apostolic Constitution *Deus Scientiarum Dominus:* Its Origin and Spirit"—*Theological Studies,* IV (1943), 34-52.

Walter B. Kennedy, "Storm Over Law Schools"—*Thought,* XVIII (1943), 41-50 (shows the effects of the "realist" law theory on legal education and criticizes the educational experimentation of many present-day law schools).

Church and State

J. H. Miner, "Religion and the Law"—*Chicago-Kent Law Review,* XXI (1943), 156-180 (discusses judicial cases in which religious sectarian practices and propaganda were held to be in conflict with the Law).

Clerics—Jurisdiction—Pastors

Frei Aleixo, "Incardinação e excardinação"—*Revista Eclesiástica Brasileira,* II (1942), 436-444 (a summary of the law on incardination and excardination, with samples of the pertinent forms).

G. Alamilla, "El Error Común en el Sacramento de la Penitencia"—*Christus,* VII (1942), 623-629; N. G. Moratín, "El Error Común y el Canon 209"—*ibid.,* VIII (1943), 193-199; with a reply by Alamilla, *ibid.,* 199-213.

Felisberto Gilles, "Os religiosos e as paróquias"—*Rev. Ecl. Bras.,* II (1942), 332-348 (continued; cf. The Jurist, II [1942], 315).

Religious—Confraternities

J. P. Donovan, "Religious Jurisdiction and Occasional Confessions"—*Homiletic and Pastoral Review,* XLIII (1943), 412-416 (holds that a priest with unlimited jurisdiction from a religious Ordinary to hear confessions may validly and lawfully hear the occasional confession of a religious woman under can. 522).

C. Piontek, "Choir Duty and Conventional Mass in Religious Communities"—*ibid.*, 602-608; 718-725 (on the obligation imposed by can. 610, §§ 1-2 and its relation to can. 595, § 1, n. 2; to be continued).

[The editors], "The Prudent Use of Confession Privileges"—*Review for Religious*, II (1943), 74-84 (discusses among other questions the interpretation of can. 522).

A. C. Ellis, "Superiors and Manifestation of Conscience"—*ibid.*, 101-108.

G. Fernandes, "O decreto *Quemadmodum* e a conta da consciência"—*Rev. Ecl. Bras.*, II (1942), 582-604; "O canon 530 e a conta da consciência"—*ibid.*, 902-913 (studies the Roman jurisprudence before and after the decree *Quemadmodum* of December 17, 1890, which forbade superiors to induce their subjects to a manifestation of conscience; the relation of can. 530 to the same decree; discusses the question why the Plenary Council of Brazil, decr. 121, ordered the decree *Quemadmodum* to be read yearly in religious communities, although the decree has no force of law after the code by virtue of can. 6, 6°).

C. Gumbinger, "The Secular Fraternity of Tertiary Priests in Rome"—*Homil. Past. Rev.*, XLIII (1943), 339-344.

Holy Eucharist

G. L. Clark, "Sacramental Wines"—*Homil. Past. Rev.* XLIII (1943), 769-775.

Frei Aleixo, "Vinho para a celebração de santa Missa"—*Rev. Ecl. Bras.*, II (1942), 972-988.

Penance

D. D. Higgins, "Written Confession for Absolution"—*Homil. Past. Rev.*, XLIII (1943), 782-785 (holds that deaf-mutes are not only not obliged, but should be discouraged to write their confessions).

E. F. Healy, "The Seal of Confession"—*Rev. for Rel.*, II (1943), 176-186.

Marriage

J. Bennett, "Problems Arising from Legal Adoption"—*Clergy Review*, XXIII (1943), 162-167 (with reference to cans. 1059, 1080; suggests the notation of adopted status in baptismal registers).

Th. H. Kay, "A Catechism for Pastors on the *Instructio* of the Sacred Congregation of the Sacraments"—*Ecclesiastical Review*, CVIII (1943), 14-22; 93-95 (concerning the Instruction of June 29, 1941, on prenuptial investigations).

J. J. Clifford, "The Interpretation of Can. 1097"—*ibid.*, 116-125 (concludes that, with regard to § 2, the Ordinary may substitute a grave reason for the *iusta causa;* that he is the judge of the *iusta causa;* that the pastor of the groom needs the permission of, or must inform the pastor of the bride; that a proper pastor of the groom may be the first to grant permission to a non-proper pastor for licit assistance; that a delegated non-pastor who assists illicitly is obliged to return the stole fee).

Th. R. Hanley, "The Natural Law on Marriage"—*ibid.*, 195-208; 298-309 (with a conclusion summarizing twelve "dictates of Natural Law" in matters of marriage).

J. P. Donovan, "A Baptismal Questionnaire for Marriage"—*Homil. Past. Rev.*, XLIII (1943), 328-334; 456-457 (on the means of determining *in casu* validity or non-validity of heretical baptisms).

P. Arruda Câmara, "O casamento religioso com efeitos civis"—*Rev. Ecl. Bras.*, II (1942), 445-448 (on civil effects of marriage in church and its prerequisites in Brazilian law).

Frei Pacômio Thieman, "De canone 1098 et matrimonio civili"—*ibid.*, 448-460; 739 (discusses the conditions under which civil marriage can be valid according to can. 1098, if there is true marital consent; the presence of these conditions must be verified in each individual case).

Ecclesiastical Magisterium

W. Butterfield, "Co-operation with Non-Catholics"—*Clergy Review*, XXII (1942), 160-165; M. Bévenot, "No Common Christian Basis?"—*ibid.*, 266-269; E. J. Mahoney, "Christian Co-operation", *ibid.*, 294-311 (with abstracts from fourteen papal documents, 1895 to 1942); K. T. L., "Experiment in Co-operation", *ibid.*, 342-346; D. K., "Another Experiment in Co-operation", *ibid.*, 385-392; H. Johnson, "Christian Co-operation: Its Antecedents and Possibilities"—*ibid.*, XXIII (1943), 105-109; cf. also the further discussion by Mahoney, *ibid.*, XXII, 239; 383; Butterfield, *ibid.*, XXII, 335.

Frei Aleixo, "Sobre a leitura de livros proibidos"—*Rev. Ecl. Bras.*, II (1942), 466-476.

T. L. Bouscaren, "Co-operation with Non-catholics: Canonical Legislation"—*Theological Studies*, III (1942), 475-512 (illustrates the legislation of the Church on co-operation in worship, admission of non-catholics to Catholic services, and doctrinal discussion with non-catholic with many cases and decisions from the *Fontes* and with recent decisions; holds with Vermeersch that can. 1325 does not forbid private discussions, and that the Instruction of the Congregation of Extraordinary Affairs of January 27, 1902 on discussions with socialists was issued only for Italy).

J. C. Murray, "Intercredal Co-operation: Some Further Views"—*ibid.*, IV (1943), 100-111.

Temporal Goods

W. J. Anderson, "The War Damage Act and Catholic Charities"—*Clergy Rev.*, XXII (1942), 312-317; "Plain Substituted Buildings" (in war damage cases)—*ibid.*, 499-502.

Penal Law

Boaventura de Santa Maria, "Imputabilidade e psicopatia em face da Moral e do Direito"—*Rev. Ecl. Bras.*, II (1942), 637-644.

Frei Aleixo, "De reconciliatione sacerdotis qui matrimonium attentare praesumpserit"—*ibid.*, 727-732.

History of Canon Law

Angel Custodio Vega, "El Pontificado y la Iglesia Española en los siete primeros siglos"—*La Ciudad de Dios,* CLIV (Escorial, 1942), 23-56; 237-284; 501-524; CLV (1943), 69-103 (ample documentation of the relations of the Papacy to the Spanish Church in the first seven centuries).

P. J. Hamell, "The African Church and the Decian Persecution"—*Irish Ecclesiastical Record,* 5, LIX (1942), 385-402; 483-494; LX (1942), 24-31 (with particular reference, in the second and third instalments, to the problem of the lapsed and their reconciliation).

W. Conway, "The Juridical Notion of the Exemption of Religious and Its Early Development"—*ibid.,* 5, LIX (1942), 501-515 (reviews, after a brief summary of the present law, the development of the early centuries; insists that the first steps towards exemption in church history cannot be treated in a generalizing way, since primitive legislation was concerned primarily with concrete problems, not with abstract principles; shows the regional differences of the development in the East, in Africa, in Italy, in Gaul; examines some letters of St. Gregory the Great and concludes that in the early times only the elements of the problem of exemption emerge, but that there was as yet no universal norm).

A. Vasiliev, "An Edict of the Emperor Justinian II, September, 688"—*Speculum,* XVIII (1943), 1-13 (edits and analyzes an inscription from Thessalonica in which the Emperor donates to the Cathedral of St. Demetrius the *salina* [salt store] situated in that city, for the maintenance of the church and the clergy).

V. H. H. Green, "The Donation of Constantine"—*Church Quarterly Review,* CXXXV (1942), 39-63 (on the medieval and early modern controversies regarding the interpretation of the *Donatio Constantini* and its use for or against the Papacy; on the criticisms advanced by Cardinal Nicholas of Cues, Lorenzo Valla, and the [later deposed] Bishop Pecock of Chichester who wrote in 1448-1449; on the decline of the importance of the document in the late fifteenth century and its final refutation by Baronius).

G. B. Flahiff, "Ecclesiastical Censorship of Books in the Twelfth Century" —*Mediaeval Studies,* IV (1942), 1-22 (a close scrutiny of twelfth century theological literature reveals that the current view—which holds that previous censure of books dates only from after the invention of printing—is true only as far as regards a regular procedure and machinery for previous censure, and as regards obligatory censorship, but as early as the twelfth century, frequent repressive condemnations of authors made it advisable for theological writers to secure themselves previous examination by others to obviate repressive censure. This "voluntary censure" is inferred in many cases by prefaces and dedicatory letters in which authors not only protest their humility and incompetence, or submit their teaching in advance to the authority of the Church, but also request the addressees—who might be outstanding scholars, bishops, cardinals, or even the pope—to examine and to correct the book in question, before the author puts it into circulation; full documentary evidence for this informal censorship is preserved in the case of Ralph Nigel [*flor.* 1160-

1194] for whose books Popes Clement III and Celestine III appointed examining commissions, upon Niger's own request).

M. Burbach, "Early Dominican and Franciscan Legislation Regarding St. Thomas"—*Mediaeval Studies,* IV (1942), 139-158.

J. J. Saunders, "The Catholic Origin of the English Tradition"—*Dublin Review,* C (1942), 115-126 (holds that the Common Law in its development since Bracton is based on Catholic principles of law, as opposed to Roman Law which is said to equal absolutism [1]).

W. Lawson, "Return to the Middle Ages"—*The Month,* CLXXVIII (1942), 464-471 (protesting against the journalistic usage of the word, mediaeval, as equivalent to barbarous, the author discusses the civilizing action of the Church in the Middle Ages through Canon Law, e. g., in the penitentials, in legislation safeguarding essential freedoms, in redemption of prisoners, humanization of warfare, truce of God, etc.).

L. C. Shephard, "Carmel in England, The Seventh Centenary"—*Clergy Review,* XXII (1942), 493-499 (a summary of the history of the English Carmelites, since 1242).

F. Schulz, "Critical Studies on Bracton's Treatise"—*Law Quarterly Review,* LIX (1943), 172-180 (reviews some positions held by the late H. Kantorowicz in his posthumous book, *Bractonian Problems* [Glasgow, 1941] and shows by critical comparison of texts that Bracton borrowed some of his teachings on actions—not as Maitland and Kantorowicz believe—from the civil law glossator, Azo, but from the canonist, Tancred [2]).

Isabel R. Abbott, "Taxation of Personal Property and of Clerical Incomes, 1399 to 1402"—*Speculum,* XVII (1942), 471-498.

Th. E. Atkinson, "Brief History of English Testamentary Jurisdiction"—*Missouri Law Review,* VIII (1943), 107-128 (treats, among other things, of the ecclesiastical jurisdiction over wills in pre-reformation times).

W. Stanford Reid, "Scotland and the Church Councils of the Fifteenth Century"—*Catholic Historical Review,* XXIX (1943), 1-24.

P. J. Dalton, "Fr. de la Taille and the Council of Trent"—*Australasian Catholic Record,* XIX (1942), 207-227.

Vincente Beltran de Hereda, "Domingo de Soto en el Concilio de Trento"—*Ciencia Tomista,* LXIII (1942), 113-147 (to be continued).

[1] The author's views on Roman Law are, however, superficial and historically incorrect. His assertions that Justinian's Code was a "pagan law", or that the keynote of Roman Law is found in the principle, *Quod principi placuit, legis habet vigorem,* are as untenable as his conclusion that the contempt for the rule of law in Nazi Germany goes back, ultimately, to the "reception" of Roman Law in the later Middle Ages. The indebtedness of the Church to Roman jurisprudence is entirely overlooked.—Reviewer's note.

[2] Schulz agrees, however, with Kantorowicz's main thesis, *viz.* that Bracton was not responsible for the blunders in Roman Law which occur in his treatise, but that we have to explain them by assuming that all the manuscripts preserved are derived from a faulty archetype, copied after Bracton's death by his clerk from the lost original without proper care. Yet Schulz advocates, against Kantorowicz's radical criticism of the texts, greater caution in conjectural emendations.—Kantorowicz's central thesis is entirely rejected by the last editor of Bracton, G. Woodbine, in a lengthy review, *Yale Law Journal,* LII (1943), 428-444.—Reviewer's note.

A. Beck, "The English Counter Reformation"—*Clergy Review,* XXII (1942) 262-265 (on the occasion of the book by Hughes; cf. *supra,* p. 165); "The Elizabethan Apostasy"—*ibid.,* 433-442.

H. J. Nolan, "Philadelphia's First Diocesan Synod, May 13-15, 1832"—*Records of the American Catholic Historical Society of Philadelphia,* LIV (1943), 28-43.

J. D. Hannan, "An American Ecclesiastical Code"—*Homiletic and Pastoral Review,* XLIII (1943), 726-730 (on Archbishop Spalding, the "Gasparri of the United States" and the Second Plenary Council of Baltimore which Spalding intended to be a complete repertory of American Canon Law).

J. D. Hannan, "A Legal Chart for the Underprivileged"—*Ecclesiastical Review,* CVIII (1943), 331-336 (describes the transformation of the United States from a missionary country, depending on the Congregation of the Propagation of the Faith, into a country of ordinary canonical organization, and the various steps of this development, leading from the successive decrees, *Ne temere, Sapienti consilio, Maxima cura,* to the Code in which the "underprivileged" status of the Church in America is definitely abolished).

Cases and Consultations

Necessity that justifies saying mass without server (p. 228).
On whose authority may parish be given to religious; Right of ownership over religious parochial church (pp. 230-234).
—J. J. Nevin, *Australasian Catholic Record,* XIX (1942).

Obligation of hearing mass satisfied outside church or oratory (pp. 45-49: J. J. Nevin).
Occasional confessor of religious women (pp. 51-54: *id.*)
Administration of solemn baptism in private houses (p. 55: J. Carroll)
Mass at least once a week in churches and oratories where Blessed Sacrament is reserved (p. 57: *id*)
—*Austral. Cath. Rec.,* XX (1943).

Mixed marriage with a divorced Protestant (p. 1055: M. Gómez).
Age required for first communion (p. 1153: J. S. Sánchez)
Homeopathic practices exercised by priest (p. 1155: *id.*)
—*Christus,* VII (1942).

Distribution of communion in danger of death; eucharistic fast (p. 87: J. S. Sánchez).
Separation from adulterous husband; entrance in religion invalid (p. 295: M. Gómez).
Disparity of worship (p. 305: *id.*).
Legitimation of childen (p. 310: L. Vega).
Assistance to marriage without pastor's authorization (p. 393: M. Gómez).
Bination (p. 395: L. Vega).
Reservation of Blessed Eucharist (p. 505: J. G. Anaya).
Funeral rites (p. 508: *id.*).
—*Christus,* VIII (1943).[3]

[3] English titles supplied by the reviewer.

Crimen—promise of marriage (p. 36).
Reservation in internment camps (p. 37).
Clerical dress [of traveler] (p. 39).
Women—uncovered head (p. 40).
Civil marriage (p. 79).
Missa pro populo (p. 80; see also XXIII [1943], 41)
November masses (p. 81).
General absolution [at beginning of air raid] (p. 82).
Erection of stations of the Cross (p. 128).
Bishop's throne (p. 130).
Parish hall in church basement (p. 131).
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Abridged funeral rites (p. 226).
Nuptial blessing (p. 227).
Sunday Mass precept and children (p. 228).
Oratio imperata (p. 230).
One baptismal sponsor (p. 231).
Indissolubility of marriage (p. 276).
Application for Holy Orders (p. 279).
Lapsed Catholic and marriage (p. 280).
Eucharistic fast—time computation (p. 281; see also XXIII, 190; 240).
Mass obligation (p. 327).
Army chaplains and *Missa pro populo* (p. 329).
Reception of converts (p. 331).
Procedure in baptizing children (p. 371, 480).
The font water (p. 374).
Parish priest and *sanatio* (p. 375).
Registration of baptism (pp. 423, 556; XXIII, 192).
Form of statue *B.V.M.* (p. 424).
Nuptial Mass (p. 424).
Domicile (p. 425).
Restitution to the poor (p. 463).
Kneeling during marriage rite (p. 464; XXIII, 81).
Marriage register (p. 465).
Canonical examination before profession (p. 466).
Abjuration of heresy (p. 467).
Ignorance of Natural law impediment (p. 514).
Honorary canons (p. 517).
Freedom to marry (p. 558).
Cathedraticum (p. 559).
[Communion taken to] Expectant mothers (p. 560).

—E. J. Mahoney, *Clergy Review*, XXII (1942).[4]

Venereal disease prophylactics (p. 38).
Implied dispensation from crime (p. 40).

[4] The 1942 numbers of the *Clergy Review* have not been available to the reviewer before now, with one exception (cf. THE JURIST, II [1942], 320); for sake of continuity the titles of this one number (pp. 128-131) are repeated here.

Missionary union faculties (p. 42).
United services [in non-catholic clubs] (p. 81).
Custom and superior's consent (p. 83).
Non-catholic seeking Holy Communion (p. 84).
Absolution form for children (p. 85).
Absolution from reserved censures (p. 85).
Absolution in danger of death (p. 130).
Marriage before a non-catholic minister (p. 131).
Supplying baptismal ceremonies (pp. 133, 225).
Baptism of embryo (p. 180).
Mass server (p. 180).
Private baptism (p. 181).
Deacon and Holy Eucharist (p. 182).
Ordination days (p. 183).
Exequial Mass on Sunday (p. 184).
School children missing Mass (p. 224).
Requiem Mass applied to the living (p. 227).
Procurators and advocates (p. 228).
Funeral of unbaptized infants (p. 278).
Theatre law (p. 279).
Reservation *in periculo mortis* (p. 280).
Benefices reserved to the Holy See (p. 282).
Preservation of deceased person's heart (p. 283).
—E. J. Mahoney, *Clergy Review,* XXIII (1943).

The Christmas Masses (p. 461).
The doctor's ring and biretta (p. 461).
Assistance to a prelate (p. 462).
Use of pontificals by an abbot in a parish church (p. 469).
—*Ecclesiastical Review,* CVII (1942).

Delegating pastoral powers of dispensing (p. 59: C. V. Bastnagel).
Faculties for enrolling in the five scapulars separately (p. 223).
The biretta at low Mass (p. 309: W. Lallou).
Benediction after Mass? (p. 311).
Absolution from censures when in danger of death (p. 376: McVeigh).
The juridical position of a religious order (p. 381: E. G. Roelker).
Is a parish for colored people a "national" parish? (p. 382: C. V. Bastnagel).
Continuance of faculties granted to religious (p. 390: E. G. Roelker).
—*Eccl. Rev.,* CVIII (1943).

Can standard time become usual time? (p. 264).
Pastor assists at mixed marriage outside parish (p. 264).
Using Pauline privilege to marry non-catholic (p. 266).
[Impediment of age and laws of State] (p. 266).
[Excommunication for attempted marriage] (p. 266).
Supplying a defect at Mass (p. 267).
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May a religious superior delegate deacon to distribute communion? (p. 268).
Sunday High Mass (p. 352).

[Error on disease of spouse] (p. 353).
Hospital chaplain worried over undischarged Masses (p. 354).
[Limitation of use of marriage] (p. 354).
Invalid marriage and reception of sacraments (p. 354).
Officers' families and civilians sharing abstinence exemption (p. 355).
Is dispensation valid if given to alien? (p. 355).
Washing of Sacred linens (p. 455).
Mass of reposition (p. 455).
Child of non-catholic parents baptized in the Church (p. 456).
Territorial pastor assisting at marriage in institutional parish (p. 458).
War time and standard time (p. 543).
Temporary vows of a religious changing institutes (p. 544).
New form of papal blessing (pp. 545, 832).
May the confessions of boarding school girls be restricted? (p. 545).
Easter collection held back (p. 642).
[Hearing confession of non-parishioner] (p. 643).
Blessed ashes given to the laity to take home (p. 743).
Sisters confessing in parish churches (p. 744).
Candidate for tonsure without domicile (p. 745).
Selling in church (p. 746).
Calling a [protestant] minister [for protestant in Catholic hospital] (p. 746).
High Mass for the dead (p. 747).
[Priest appearing in public with minister and rabbi] (p. 833).
Priest giving minister material for communion service (p. 834).
[Distance of witnesses at marriage from the Altar predella] (p. 835).
Conditional baptism after baptism by Catholic physician (p. 835).
Reading entire Canon in English from pulpit at Mass (p. 836).

—J. P. Donovan, *Homiletic and Pastoral Review,* XLIII (1942/1943)

Liceity of certain announcements regarding the reception of Holy Communion (p. 461: J. McCarthy).
Baptism of children whose parents have been married outside the Catholic Church (p. 464: *id.*).
Recent decree on direct killing of innocent persons by public authority (p. 468: *id.*).
Grave inconvenience justifying the celebration of marriage without a priest (p. 470: M. J. Fallon).
Parochial midnight Mass at Christmas—distribution of Holy Communion during the Mass (p. 472: *id.*).
Reduction of Mass obligations of pious bequest (p. 541: J. McCarthy).
Guarantees in validation of a mixed marriage (p. 543: M. J. Fallon).
Ownership and administration of sodality funds (p. 545: *id.*).

Irish Ecclesiastical Record, 5, LIX (1942).

Obligation of Convent chaplain to correct injustice (p. 296: J. McCarthy).
Contraceptives and prophylactics (pp. 301, 369: *id.*).
Meaning of the word, *dolus,* in Canon Law (p. 303: M. J. Fallon).

Obligation to receive profession of novice who has been deemed suitable (p. 304: *id.*).
Reckoning of final profession date—Month's science course by novice (p. 305: *id.*).
Cessation of reservation—Advertence necessary for grave sin—Grave penance for grave sin (p. 371: J. McCarthy).
Applying plenary indulgence to souls in purgatory (p. 374: *id.*).
Episcopus castrensis may grant a dispensation *mixtae religionis* or *disparitatis cultus* between a non-catholic soldier and a catholic (p. 445: W. Conway).
Direct application to the Holy See for a *sanatio in radice* (p. 447: *id.*).
Private Mass of an Abbot (p. 448: G. Montague).
—*Irish Eccl. Rec.*, 5, LX (1942).

The privilege of mental recitation of the divine office (p. 57: J. McCarthy).
Obligation of a parish priest who accepts money to cover funeral expenses of parishioner (p. 58: *id.*).
Mass obligations under a will (p. 60: *id.*).
Law of abstinence and the use of suet (p. 61 *id.*).
Reservation of Blessed Sacrament in priests' houses—Daily Mass and weekly confession in outlying churches (p. 63: W. Conway).
Obligation of the clergy to contribute to the repair of Cathedral and other churches (p. 65: *id.*).
Conditional baptism of an adult convert from heresy (p. 68: G. Montague).
Funeral ceremony (p. 69: *id.*).
—*Irish Eccl. Rec.*, 5, LXI (1943).

Right of junior member of family to vote (p. 422).
Reading of decrees of Holy See (p. 423).
Residence of sister catechists (p. 425).
Re-election of councillors (p. 425).
—*Review for Religious*, I (1942).

Permissions by local superior other than one's own (p. 67).
Superiors and dispensations from fasting (p. 70).
Questions in confessional after absolution (p. 141).
Manifesting community difficulties to confessor (p. 141).
Difference between permission and dispensation (p. 142).
Studies during canonical year (p. 143).
Superior's obligation to mail letters (p. 143).
Retreat master as extraordinary confessor (p. 212).
Reason for removing local superior (p. 212).
Postulant M. D. prescribing for community (p. 212).
Litanies approved for public use (p. 213).
Providing for sister who leaves community (p. 214).
Taxing for support of motherhouse (p. 214).
Pension for work done before entering religion (p. 216).
Mistress of novices subject to local superior (p. 216).
—*Rev. for Rel.*, II (1943).

Forbidden books (p. 476: Frei Aleixo).
First communion in other rite (p. 476: H. Borges).

De transitu ad alium ritum (p. 478: Frei Aleixo).
Rosary and can. 934 (p. 480: *id.*).
Civil marriage and religious vocation (p. 481: Frei Tibúrcio).
Obligatory force of civil laws (p. 720: Porfírio de Sousa).
Sisters and obstetrical art (p. 735: P. Monteiro).
Facultative civil marriage (p. 737: A. Câmara).
Euthanasia (p. 740: A. R.).
Defectus a sponsis relevandi (p. 742: Frei Aleixo).
De matrimonio civili non baptizatorum (p. 988: Pacômio Thieman).
Baptismal registration of adulterine children (p. 1016: P. Monteiro).
Stipendium missae binationis (p. 1017: P. Thieman).
Imposition of name in baptism (p. 1018: H. Borges).
Administration of sacraments in outdoor clothing (p. 1019).
Public and private benediction (p. 1020: Frei Aleixo).
—*Revista Eclesiástica Brasileira,* II (1942).[5]

Stephan Kuttner
The Catholic University of America

[5] Portuguese titles translated by the reviewer.

Chronicle

UNIVERSITY

The fifty-fourth annual commencement of The Catholic University of America was held Wednesday, May twenty-sixth and the order of exercises was as follows:

Processional	The Catholic University Band
Presiding	Most Rev. Peter L. Ireton, S.T.D., Coadjutor Bishop of Richmond and Secretary of the Board of Trustees
Invocation	Bishop Ireton
Announcements	The Rector of the University
Recognition of the Deans of the Schools of the University	Right Rev. Edward B. Jordan, S.T.D.
Conferring of Degrees in Course	
Address	Honorable James M. Mead U. S. Senator from New York
Valedictory	John Francis Dillon
Alma Mater	The Catholic University Band and Choir
The Star Spangled Banner	The Catholic University Band and Choir and Assembly
Benediction	Bishop Ireton
Recessional	The Catholic University Band

Degrees in the School of Canon Law were awarded as follows:

BACHELOR IN CANON LAW (J.C.B.)

Rev. Ralph Anthony Asplan	Cincinnati, Ohio
Rev. Ralph Francis Balzer, C.P.	Union City, N. J.
Rev. Damian Joseph Blaher, O.F.M.	Washington, D. C.
Rev. Bernard Joseph Cullen	Denver, Colo.
Rev. Francis Patrick Dixon	St. Augustine, Fla.
Rev. John Whelan Dougherty	Philadelphia, Pa.
Rev. Michael Walter Dziob	Providence, R. I.
Rev. John Albert Eidenschink, O.S.B.	Collegeville, Minn.

Rev. Basil Frison, C.M.F. ..... Washington, D. C.
Rev. Nicholas Gill, C.P. ..... Union City, N. J.
Rev. Orville Nicholas Griese ..... Green Bay, Wis.
Rev. Harry Gerald Hynes ..... Philadelphia, Pa.
Rev. John William Love ..... St. Augustine, Fla.
Rev. Gerald Vincent McDevitt ..... Philadelphia, Pa.
Rev. Thomas Lawrence McManus ..... London, Ontario, Can.
Rev. Charles John Malloy ..... Detroit, Mich.
Rev. Leroy Joseph Manning ..... San Antonio, Tex.
Rev. Cletus Francis O'Donnell ..... Chicago, Ill.
Rev. Francis Patrick Sweeney, C.SS.R. ..... Washington, D. C.
Rev. Stanley Aloysius Tarczan, C.R. ..... Washington, D. C.
Rev. Henry John Vogelpohl ..... Cincinnati, Ohio
Rev. John Alan Walker, C.M. ..... Washington, D. C.

LICENTIATE IN CANON LAW (J.C.L.)

Rev. Francis Coleman Carroll, J.C.B. ..... Pittsburgh, Pa.
Rev. Joseph Edward Cieslukowski, J.C.B. ..... Grand Rapids, Mich.
Rev. Vincent Paul Coburn, J.C.B. ..... Newark, N. J.
Rev. Charles Paul Connors, C.S.Sp., J.C.B. ..... Washington, D. C.
Rev. Paul Raymond Coyle, J.C.B. ..... Pittsburgh, Pa.
Rev. Joseph John Dunleavy, J.C.B. ..... Marquette, Mich.
Rev. Bartholomew Francis Fair, J.C.B. ..... Philadelphia, Pa.
Rev. Thomas Raphael Gallagher, O.P., J.C.B. ..... Washington, D. C.
Rev. John Mark Gannon, J.C.B. ..... Erie, Pa.
Rev. James William Goldsmith, J.C.B. ..... Charleston, S. C.
Rev. Joseph Gerard Goodwine, J.C.B. ..... New York, N. Y.
*Rev. John Joseph Heneghan, J.C.B. ..... Brooklyn, N. Y.

* Work completed February, 1943.

Rev. Robert Owens Hickman, J.C.B. ..... Richmond, Va.
Rev. Romuald Eugene Kowalski, O.F.M., J.C.B. ..... Washington, D. C.
Rev. David William McCarthy, J.C.B. ..... Paterson, N. J.
Rev. Alan E. McCoy, O.F.M., J.C.B. ..... Washington, D. C.
Rev. Vincent John McDevitt, J.C.B. ..... Philadelphia, Pa.
Rev. J. William McKune, J.C.B. ..... Louisville, Ky.
Rev. Thomas Owen Martin, J.C.B. ..... Grand Rapids, Mich.
Rev. Paul John Miklosovic, J.C.B. ..... Philadelphia, Pa.
Rev. Michael John Mleko, J.C.B. ..... Lansing, Mich.
Rev. Thomas Maurice Mundy, J.C.B. ..... Philadelphia, Pa.
Rev. John Coyle O'Dea, J.C.B. ..... San Francisco, Calif.
Rev. Pierre Marie Poisson, C.S.C., J.C.B. ..... Washington, D. C.
Rev. Richard James Schumacher, J.C.B. ..... Kansas City, Mo.
Rev. Casimir Joseph Stadalnikas, M.I.C., J.C.B. ..... Washington, D. C.
Rev. Bernard C. Stolte, J.C.B. ..... St. Louis, Mo.
Rev. Eugene Henry Sullivan, J.C.B. ..... Philadelphia, Pa.
Rev. William Edward Vaughan, J.C.B. ..... Salt Lake City, Utah
Rev. Urban Stanley Wagner, O.M.C., J.C.B. ..... Washington, D. C.

DOCTOR IN CANON LAW (J.C.D.)

Rev. Matthew Aloysius Benko, O.S.B., J.C.L.....Latrobe, Pa.
Dissertation: *The Abbot* NULLIUS.

Rev. Joseph James Christ, J.C.L.....Chicago, Ill.
Dissertation: *Dispensation from Vindicative Penalties.*

Rev. Patrick Michael J. Clancy, O.P., J.C.L.....Washington, D. C.
Dissertation: *The Local Religious Superior.*

Rev. Thomas James Clarke, J.C.L.....Indianapolis, Ind.
Dissertation: *Parish Societies.*

Rev. John Patrick Connolly, J.C.L.....San Francisco, Calif.
Dissertation: *Synodal Examiners and Parish Priest Consultors.*

Rev. William Martin Drumm, J.C.L.....St. Louis, Mo.
Dissertation: *Hospital Chaplains.*

Rev. Bernard Joseph Flanagan, J.C.L.....Burlington, Vt.
Dissertation: *The Canonical Erection of Religious Houses.*

Rev. Stephen Joseph Kelleher, J.C.L.....New York, N. Y.
Dissertation: *Discussions with Non-Catholics: Canonical Legislation.*

Rev. Gordian Lewis, C.P., J.C.L.....Louisville, Ky.
Dissertation: *Chapters of Religious Institutes.*

Rev. Adolph Marx, J.C.L.....Corpus Christi, Tex.
Dissertation: *The Declaration of Nullity of Marriages Contracted outside the Church.*

Rev. Raymond Anthony Matulenas, O.S.B., J.C.L...Peru, Ill.
Dissertation: *Communication, a Source of Privileges.*

Rev. Charles Gerard O'Leary, C.SS.R., J.C.L.....Washington, D. C.
Dissertation: *Religious Dismissed after Perpetual Profession.*

Rev. Cornelius M. Power, J.C.L.....Seattle, Wash.
Dissertation: *The Blessing of Cemeteries.*

Rev. Ralph Vincent Shuhler, O.S.A., J.C.L.....Washington, D. C.
Dissertation: *Privileges of Regulars to Absolve and Dispense.*

Rev. Thaddeus Stanislaus Ziolkowski, J.C.L.....St. Cloud, Minn.
Dissertation: *The Consecration and Blessing of Churches.*

* * * *

On May 16, at the National Shrine of the Immaculate Conception, the University inaugurated with a Pontifical Mass of Thanksgiving a silver jubilee year in commemoration of the enactment of the Code of Canon Law. Most Rev. George L. Leech, D.D., Bishop of Harrisburg, ranking alumnus of the School of Canon Law, was celebrant. Very Rev. Msgr. James H. Griffiths, S.T.D., Vice Chancellor of the Diocese of Brooklyn, delivered the sermon.

On June 6, over the Church of the Air, there was broadcasted an appropriate program of music and a sermon by Rev. James P. Kelly, J.C.D., President of the Canon Law Society of America.

Regional meetings of the Canon Law Society of America, held as part of the jubilee commemoration, convened in Washington on May 16 and in New York on May 19. Very Rev. William J. Doheny, C.S.C., J.U.D., Vice General of the Congregation of the Holy Cross, read the paper at both meetings on the subject of the implications of Canon 1990.

The year's celebration will also include a series of lectures on Canon Law for Catholic laymen at the University and in other cities, as well as a number of addresses at a selected list of law schools.

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Rt. Rev. Msgr. Francis J. Haas, Ph.D., dean of the School of Social Science, has been appointed by President Roosevelt Chairman of the Fair Employment Practice Committee.

WAR ACTIVITY

"Principles for Peace", an 894-page volume prepared under the direction of the Bishops' Committee on the Pope's Peace Points, has been published by the National Catholic Welfare Conference, and sets forth the peace pronouncements of five Popes, from Leo XIII to Pius XII. The Bishop's Committee was composed of Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago, chairman; Most Rev. James H. Ryan, D.D., Bishop of Omaha; and Most Rev. Aloisius J. Muench, D.D., Bishop of Fargo. Rev. Harry C. Koenig, librarian at St. Mary of the Lake Seminary, Mundelein, acted as editor and wrote the introduction. Archbishop Stritch wrote the preface.

* * * *

From November to March 1, a total of 221 American prisoners were listed as being in Italian prisoner-of-war camps. During the first week of March, 264 more were added, and 108 were later hospitalized. The Vatican Information Office for War Prisoners has established and is maintaining contact with these American prisoners through visits of chaplains and representatives of the Vatican. Mass is offered every morning and the Rosary is recited every evening. The names of all United States soldiers held prisoner in Italy are cabled to America at once. News of prisoners in Germany and Russia is not available.

Thousands of messages are daily received and dispatched at the Apostolic Delegation, Washington, D. C., to and from every diocese and every State in the United States, and to and from nations all over the world. They are from parents or wives of war prisoners overseas; from service men; from or to war internees; and from or to civilians separated from their families by the war. In a typical day, messages had been received from or to persons in Germany, France, Belgium, Yugoslavia, Roumania, Egypt and Turkey; in a typical week, most of the world is represented.

In one instance, officials of the Vatican met a hospital ship bearing wounded American prisoners from North Africa and were able to reassure their families in the United States before the men had arrived at their camp. In five weeks all their families had messages direct from the soldiers. This information

comes direct by radiogram to the Apostolic Delegation which informs the bishop of the appropriate diocese.

Where messages are sent either from the soldiers or from their relatives a definite formal procedure is observed. When it comes from relatives, it is to be written on a form which any pastor can supply, limited to twenty-five words, and concerned only with family matters. The form is given to the Chancery Office of the proper diocese, whence it is transmitted to Washington, where it is catalogued, numbered, and classified. Thence it is passed through the United States Censorship Office to the Vatican. There it is again classified and recorded and sent to the diocesan officials in the country where the prisoner is detained. Eventually it will be returned with the observance of a similar procedure, an answer written on its reverse side.

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Church activities have been added to the Index of Essential Activities by the War Manpower Commission.

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Most Rev. Paul Marella, Apostolic Delegate to Japan, has visited eight camps where prisoners of war are detained and four camps where civilian internees are in custody.

* * * *

Forces subtly attacking the Holy See in this and other countries made capital of the oath of allegiance taken by the newly appointed Spanish Bishops. The N.C.W.C. News Service, through its subscribing chain of Catholic papers, scotched this insidious viper in an article showing that an oath identical in form was provided for in the Concordats with the Republics of Poland and Lithuania; and that a similar form of oath is provided for in practically every concordat which the Holy See makes with sovereign powers, whether democratic, monarchic, or fascist.

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Service certificates will be issued to churches, colleges, and religious communities represented by chaplains in the chaplain corps of the U. S. Army.

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In March the Institutional Food Supply and Rationing Committee of the National Catholic Welfare Conference made the following recommendations to the Office of Price Administration: that the latter should recognize the institutional consumer as a distinct and separate type having little in common with public places and that it be classified in Group 2 rather than Group 3 under the Institutional Food Rationing Plan; that the per-person allowance of processed foods for Group 2 be revised upwards, inasmuch as a survey showed that institutional users can not absorb more than a 20 per cent reduction, whereas the actual reduction is 60 to 74 per cent; that an official survey be made prior to the rationing of butter, meat, cheese, and fats; and that efforts be made to stimulate the development of farming and canning programs by institutional users, especially by exempting from computation in their rationing allowance, the foods which they raise and can themselves.

The Bishops' War Emergency and Relief Committee reported in March that it had distributed to war victims in 1942 the sum of $1,322,493; $600,000 through our Holy Father for places where the Committee could not directly function, as in enemy-occupied countries and in the relief of American prisoners of war. In May, further expenditures of $344,000 were announced.

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Florence Kerr, director of War Public Services, Federal Works Agency, insists that it is the policy of the Government to encourage the mothers of young children to remain in their homes and care for their children, and that financial assistance is being given to day nurseries to care for their children, only because of the emergency and will not be continued after the war.

* * * *

In a joint Pastoral Letter on February 17, the Hierarchy of Holland stated that their fellow citizens acting in public capacities can not in conscience collaborate with the enemy invader in the enforcement of his unjust decrees.

* * * *

The Catholic University of Nijmegan and the Catholic Trade University at Tilbury, both in Holland, have closed down rather than continue operation in the restrictive measures imposed on schools and students by the German authorities. Students were obliged to sign "declarations of obedience"; so many refused that this one factor alone made continuance of the schools impossible.

* * * *

On March 21, a joint pastoral letter of the Belgian Hierarchy was read in all the churches of that country. It warned the faithful that collaboration in the Nazi program of church bell confiscation or in the conscription of Belgian workers for forced labor in Germany is gravely illicit. Reference was made to the fruitless efforts of the Holy See to persuade the Reich to refrain from both programs and to the doctrine of international law forbidding such confiscation and such conscription of labor. The conscription of labor is condemned further as failing to take into account the essential dignity and freedom of the human person, the welfare and honor of families, and the supreme good of society. The constraint thus imposed on consciences is censured as outrageous in requiring Belgian citizens to cooperate directly or indirectly with the military operations of a foreign power which has unjustly imposed on their country a severe occupational regime with no assurance for the future, placing workers in gravely harmful moral situations, and refusing the ministrations of chaplains to the exiles.

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On December 18, the German Hierarchy addressed a memorial to its government, praying for relief from religious persecution, citing parallel persecution in Alsace-Lorraine, Luxembourg, Poland, and Yugoslavia.

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The Lithuanian Hierarchy on October 13 handed a memorial to the Commisar-General in Kaunas condemning the nationalization of church property,

the rejection of chaplains for deported workers, the enticement of the young to enlist for foreign labor with alcohol and tobacco, and the obstacles raised to the free exercise of religion in Lithuanian schools.

GENERAL

His Eminence Gennaro Cardinal Granito Pignatelli di Belmonte, dean of the Sacred College of Cardinals, pontificated at the Mass in the Sistine Chapel, observing on March 12, the fourth anniversary of the coronation of His Holiness, Pope Pius XII.

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On April 23, the Most Rev. Apostolic Delegate celebrated the tenth anniversary of his consecration.

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In the course of his extended tours of the United States army camps in Europe and North Africa, His Excellency, Most Rev. Francis J. Spellman, D.D., Archbishop of New York and Military Vicar, attended the funeral of His Eminence, Arthur Cardinal Hinsley on March 23. On Easter Sunday, he pontificated at Mass in the Basilica of the Holy Sepulchre, Jerusalem.

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Most Rev. Peter L. Ireton, D.D., Coadjutor Bishop of Richmond, delivered the Benediction at the dedication of the national memorial to Thomas Jefferson at Washington, D. C., on April 13.

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The Catholic Hospital Association of the United States and Canada held its 28th annual convention in Pittsburgh June 11-14. The convention opened with a Pontifical Mass celebrated by Most Rev. Hugh C. Boyle, D.D., Bishop of Pittsburgh. The sermon was preached by Very Rev. Msgr. Howard J. Carroll, D.D., assistant general secretary of the National Catholic Welfare Conference.

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On May 30, St. Joseph's Society of the Sacred Heart, commemorated its fiftieth anniversary as an American institution. Cardinal Vaughan, Archbishop of Westminster, assented to the separation of the American group from the society of Mill Hill on that date.

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On May 20, the Catholic Press Association of the United States held its 33rd annual convention in Toledo.

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Most Rev. William T. McCarty, C.SS.R., D.D., Military Delegate, presided at the fifth annual Memorial Field Mass in the amphitheater of the Arlington National Cemetery on May 23, sponsored by the Washington General Assembly of the Knights of Columbus.

His Eminence Ermenegildo Cardinal Pellegrinetti died on March 29 at the age of 67.

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Most Rev. Louis Fillon, Archbishop of Bourges, France, and Most Rev. Lajas Szmrecsanyi, Archbishop of Eger, Hungary, died in January. On January 10, Most Rev. Joseph Marietan, Titular Bishop of Agathopolis, died at Annecy, France. In January also, Most Rev. John Jacob von Hauck, who had been Archbishop of Bamberg, Germany, since 1912, died and was succeeded by Most Rev. Joseph Kolb.

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Most Rev. Joseph C. Plagens, D.D., first Bishop of Grand Rapids, died March 31 at the age of 63. He had been Bishop of Grand Rapids since December 16, 1940, having previously been Bishop of Marquette and Auxiliary Bishop of Detroit.

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Rt. Rev. Msgr. Joseph F. Smith, Vicar General of the Diocese of Cleveland and Rector of the Cathedral, died May 24 at the age of 78.

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Most Rev. Emanuel Anatole Chaptal, Titular Bishop of Isinda and Auxiliary Bishop of Paris for Foreigners, is reported from Parish as deceased.

DIGNITIES

Most Rev. Edwin V. Byrne, Bishop of San Juan, Puerto Rico, has been named Archbishop of Santa Fe.

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On June 29, Most Rev. Joseph A. Burke, D.D., Titular Bishop of Vita and Auxiliary Bishop of Buffalo, was consecrated by His Excellency, the Most Reverend Apostolic Delegate. The co-consecrators were Most Rev. Thomas J. Walsh, D.D., Archbishop of Newark, and Most Rev. Edmund F. Gibbons, D.D., Bishop of Albany. The sermon was delivered by Most Rev. John A. Duffy, D.D., Bishop of Buffalo.

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Most Rev. James A. McFadden, D.D., Auxiliary Bishop of Cleveland, has been named first Bishop of the newly established Diocese of Youngstown, Ohio.

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Most Rev. Bryan Joseph McEntegart, executive director of War Relief Services of the National Catholic Welfare Conference, has been named Bishop of Ogdensburg.

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Most Rev. Matthew Aloysius Niedhammer, O.F.M., Cap., has been named Titular Bishop of Caloe and Vicar Apostolic of Bluefield, Nicaragua.

On May 27 Most Rev. Teofilus Matulionis was transferred from the post of Auxiliary to the Apostolic Administrator of Leningrad to the See of Kaisedorys, Lithuania.

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Most Rev. Andrew Rohrachter, Titular Bishop of Isba and Vicar Capitular of the Diocese of Gurk, has been named Archbishop of Salzburg. Most Rev. Julius Czapik, Bishop of Veszprem, has been named Archbishop of Eger and Most Rev. Joseph Grosz, Bishop of Szombathely, has been named Archbishop of Kalocsa. The latter two Sees are in Hungary.

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Most Rev. Nilus Nicolas Savaryn, O.S.B.M., has been named Auxiliary Bishop to Most Rev. Basil V. Ladyka, D.D., Bishop of the Ukrainians of the Ruthenian Rite in Canada.

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Very Rev. Arthur Hughes, acting Apostolic Delegate to Egypt, has been named by Most Rev. Francis J. Spellman, D.D., Archbishop of New York and Military Vicar, as Vicar Delegate in the Middle East for American chaplains and American troops.

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Rev. Joseph Bouniol, a missionary priest at Algiers, belonging to the White Fathers, was appointed by Most Rev. Francis J. Spellman, D.D., Archbishop of New York and Military Vicar, as Vicar Delegate for American chaplains and American troops in Northwest Africa. Rev. William Veugts has been appointed his assistant.

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Rev. Paul E. Campbell, Litt.D., LL.D., former superintendent of schools of the Diocese of Pittsburgh has been named editor of *The Journal of Religious Instruction.*

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Rev. Raymond A. McGowan, Assistant Director of the Department of Social Action of the National Catholic Welfare Conference, has been named by President Roosevelt to a committee of eight to advise him on proposed amendments to the Organic Law of Puerto Rico.

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Rev. James Lawler, priest of the Archdiocese of Chicago, has been appointed an assistant general secretary of the National Catholic Welfare Conference.

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William C. Smith, continuing in his poistion as Washington director of the National Organization for Decent Literature, will also serve as assistant executive secretary of the National Council of Catholic Men.

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Wilbert J. O'Neill, Cleveland attorney, was re-elected president of the National Council of Catholic Men, at the annual meeting of directors and members held in Washington.

Thomas F. Woodlock, New York author and editor of the *Wall Street Journal,* was the recipient of the 61st Laetare Medal award made by Notre Dame University.

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The Cross Pro Ecclesia et Pontifice has been conferred upon Kate Mahoney, for thirty-three years president of the L.C.B.A. It was bestowed in ceremonies taking place at the Cathedral of the Immaculate Conception, Albany, N. Y., May 9. The same distinction has been conferred on Mary E. Sinclair, Secretary of Most Rev. John J. Cantwell, D.D., Archbishop of Los Angeles, for twenty-five years; Mrs. Agnes Scheller, noted for her activity in behalf of the Santa Maria Clinic in Los Angeles; Mrs. Harry Johansing, former president of the Archdiocesan Council of Catholic Women, and Mrs. J. Selby Spurck, present president of the Council.

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Dr. George Speri Sperti, research professor and director of the Institutum Divi Thomae, Cincinnati, was awarded the Mendel Medal for outstanding achievement in science by Villanova College.

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The honorary degree of Doctor of Laws was conferred in May on Gen. Enrique Penaranda, President of Bolivia, by Fordham University.

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Loyola University, Los Angeles, conferred the honorary degree of Doctor of Laws on Madame Chiang-Kai Shek, wife of China's generalissimo, during her visit to California in April.

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At the 91st annual commencement of Manhattan College, honorary degrees were conferred on Rev. John P. Boland, former chairman of the New York State Labor Relations Board; President Manuel Quezon, of the Philippine Commonwealth; and Most Rev. Paul Yu-Pin, Vicar Apostolic of Nanking.

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Captain, Edward J. Moran, U.S.N., received the Navy Cross for extraordinary heroism and courage while commanding the U.S.S. *Boise* in the battle action of the Solomons. Commander Bartholomew W. Hogan, U.S.N., Medical Corps, received the Navy and Marine Corps Medal for heroism aboard the U.S.S. *Wasp.*

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Rev. John R. Boslet, Lieutenant Commander, U.S.N., priest of the Diocese of Pittsburgh, has been appointed to succeed the late Chaplain Thomas R. Knox as Catholic assistant in the office of the Chief of Chaplains, U.S.N.

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Eldon R. James, former librarian of the Harvard Law School, and professor of law at Harvard, was appointed Law Librarian of the Library of Congress, to succeed the late Dr. John T. Vance. Dr. James taught law at the

Universities of Cincinnati, Wisconsin, and Minnesota, and was dean and professor of law at the University of Missouri, 1914-1918. He was adviser in Foreign Affairs to the Siamese Government and a Judge of the Supreme Court of Siam from 1918 to 1924.

THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

1. a. Date: March 29, 1943.

   b. Title: Egyptian, Greek, and Roman Laws in Egypt and Their Interrelation.

   c. Author: Dr. Rafael Taubenschlag, Professor of Roman Law at the University of Cracow, Associate Director of the Polish Institute of Arts and Sciences in New York, and Research Professor of Papyrology at Columbia University.

   d. Abstract:

   Dr. Taubenschlag discussed the system of Egyptian law applied to the Egyptians, and the system of Greek law to which the Greek population was subject; the conflicts between the two systems and their mutual influence which resulted in the formation of a law composed of both Greek and Egyptian elements; the fate of this law under Roman domination.

   The Romanization of the Greco-Egyptian Law was counter-balanced by a similar Hellenization of the Roman Law; hence, the development of two systems of law. The Romanized local law was first applied by *peregrini,* and after the *Constitutio Antoniniana,* by Romans, too; but the Hellenized Roman Law was applied only by the Romans. From both systems Justinian adopted many institutions although he did not recognize others—which, nevertheless, continued to exist and to determine the practice of the time.

2. a. Date: April 22, 1943

   b. Title: Legal Status of Women in early Hindu, Persian, Greek, and Roman Legal Systems.

   c. Author: Dr. Roscoe J. C. Dorsey, Professor of Jurisprudence at Washington College of Law.

   d. Abstract:

   After some observations of a general nature as to the status of women in early civilizations, Dr. Dorsey concentrated on the Aryans and referred to their migrations from the shores of the Aral and the Caspian Seas into Hindustan, Persia, Greece, and Italy. In general, woman's status in early times was subjective due to her inherent weakness, inability to bear arms, and the artificial status necessary for ancestor worship. Dr. Dorsey explained how the Code of Menu, the Avesta, and the laws of the Greeks and Romans defined her legal status. The Roman law was especially emphasized.

3. a. Date: May 10, 1943
   b. Title: Correality in Roman Law.
   c. Author: Dr. James B. Thayer, Professor of Law, Harvard University Law School.
   d. Abstract:

Dr. Thayer discussed the notion of correality and its distinction from that of mere solidary obligations. Contrary to the almost universally accepted modern theory, he came to the conclusion that correality was highly exceptional in the Roman sources and that not all co-debtors promising the same thing are *Correi*, but only those who really undergo the same obligation. The extension of the concept of correality, particularly to the legal institution of suretyship, and the changes in the legal construction of suretyship in the course of Roman history were discussed, as was the verification of correality in promises of joint, indivisible undertakings and in cases of judgments condemning *singulos in solidum*.

The magisterial report for the academic year 1942-1943 was presented by Dr. Stephan G. Kuttner of the Canon Law School of The Catholic University of America. Dr. Brendan F. Brown, Scriba of the Seminar, presided.

Dr. George Maurice Morris, President of the American Bar Association, spoke on "The Place of the Organized Bar in the Life of the Lawyer." Major General Myron C. Cramer, Judge Advocate General of the United States Army, delivered a paper on "The Administration of Military Justice in the United States Army in Time of War." The Honorable Felix Frankfurter, Associate Justice of the Supreme Court of the United States, made a presentation of the Appellate Court Competition awards and the Trust Law Prizes, to winning students of the School of Law.

Refreshments and a social meeting followed in the St. Ives Law Library.

The *Concilium* for 1943-1944 consists of the following:

Vladimir Gsovski, *Magister*
Brendan F. Brown, *Scriba*
Stephan G. Kuttner
Robert J. White
Francesco G. Lardone
Walter L. Moll

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Report of the Magister of the Riccobono Seminar, Stephan G. Kuttner, J.U.D., for the Year 1942, Rendered at the Seminar Held May 10

Dr. Brown, Mr. Justice, Honorable Guests, Ladies and Gentlemen:

With the present evening, the fourteenth year of the Riccobono Seminar comes to an end. We are proud that we had the privilege, at this final conference to listen to a lecture by one of America's leading scholars in Roman Law. There could have been offered no better and no more represntative a

conclusion of our endeavors during the past academic year than Professor Thayer's learned paper on correality in Roman Law.

With penetrating acumen he has analyzed those intricate problems inherent in the Roman concept of correality which, ever since Ribbentrop published his book on *Correalobligationen* in 1831, have not ceased to puzzle modern Romanists—witness the remarkable number of studies, published in the form of monographs and of articles on this topic during the last hundred years. If I may say so, the sagacity and elegance of Professor Thayer's interpretation worthily follows the best traditions of the art of juridical reasoning which were founded, over seven hundred years ago, by the first masters of Roman Law in Medieval Europe: the glossators of Bologna, who, in turn, emulated the style and the method, not of the grammar schools of the Dark Ages, but of the classical jurisconsults themselves. As recently Kantorowicz and Buckland in their admirable book, *Studies in the Glossators of the Roman Law,* have put it: "The Glossators had the Romans for masters, and none but the Romans." In their spirit which took the Digest not as a far distant monument of history but as a live fountain of juridical thought; in this striving for intellectual communion with the Roman Jurists of old, it seems to me, we have participated tonight.

Now, since it is the customary privilege of the *Magister* of this Seminar to make the closing speech of the academic year, and since I have had this time the undeserved honor of the magistership, I should take up Dr. Thayer's topic and comment on correality too; perhaps from the angle of my own field of studies. But I am not, and never pretended to be, a scholar in Roman Law, and unfortunately (or fortunately, whichever you prefer), the civil law problems of the plurality of debtors, of the *duo rei promittendi,* have almost no place in the history of Canon Law. On the other hand, I do not wish—especially in view of the two interesting communications of more timely import with which we shall be presented tonight—to impose on you still another learned topic as subject of my address. You therefore will allow me to discharge my magisterial duty in a different way, namely by a brief review of the accomplishments of the Riccobono Seminar during this year.

I wish to begin this retrospect by a word of thanks for advice and assistance to the members of the *Concilium*—to Dr. Walter L. Moll of George Washington Law School, Dr. Vladimir Gsovski of the Law Library of Congress, Rev. Dr. Robert J. White and Right Rev. Dr. Francesco G. Lardone of this University, and in particular to our indefatigable *Scriba,* Dr. Brendan F. Brown, without whose efficient initiative, experience and, above all, devotion to the cause of the Seminar, we frequently would have failed to arrange successfully, as we did, our monthly conferences. Innumerable times during this year he had to bear with my bursting into his office, with my detaining him from his responsible work of directing the Law School of the University here and asking his help for the affairs of Seminar.

I further wish to thank the administrations of those schools and learned institutions who gave the Riccobono Seminar hospitality for its monthly meetings throughout the year. Following an established, if unwritten custom, we have met four times in this Law School (October, December, January and

May), and four times outside. Twice we were guests of Georgetown Law School (November and February), where Dean Fegan, as in previous years, received us with kind hospitality. Since another of our customary meeting places, the Cosmos Club, has not been at our disposal this year, we have a particular reason to acknowledge gratefully the kindness of two new hosts of the Riccobono Seminar. Upon the suggestion of Dr. Moll, Dean Van Vleck of George Washington Law School, invited the Seminar to meet there in March, and through the good offices of Dr. Paul J. Alexander, the Dumbarton Oaks Research Library and Collection of Harvard University gave us hospitality in April, in the beautiful Georgetown mansion from which this institution derives its name. We are deeply gratified at having made new friends of George Washington University and Dumbarton Oaks and we look forward to future successful collaboration.

Next, our most thankful appreciation is due to the labors of those who have carried the substantial burden of the Seminar's work: to the scholars, present or absent tonight, of Roman Law and Legal History, who read us their learned papers throughout the year and thus enabled us to participate in the results of their researches, laid before us new problems, and graciously bore with our inquisitive curiosity in the discussions. Four of the speakers, Dr. Edson L. Whitney of the National University, Dr. Roscoe J. C. Dorsey of the Washington College of Law, Dr. Vladimir Gsovski and Dr. Thayer are members of old standing of the Seminar; three speakers were for the first time with us this year: Dr. Angelo P. Sereni, formerly Professor of International Law at the University of Ferrara, Italy, at present Lecturer at the New School for Social Research, New York; Dr. Paul J. Alexander, graduate of the Universities of Berlin and Paris, Ph.D. in History of Harvard, and Junior Fellow of Dumbarton Oaks; Dr. Raphael Taubenschlag, Professor of Roman Law at the University of Cracow, Poland, at present Associate Director of the Polish Institute in New York and Research Professor in Juridical Papyrology at Columbia University. May the great success of their respective lectures be a token of continued happy collaboration with our group. I wish to cite also the names of the scholars who took upon themselves the task of leading in our various meetings the discussion from the floor: Dr. Martin R. P. McGuire, Dr. Herbert Wright, Dr. Francesco Lardone and Dr. Martin J. Higgins, all of this University; Dr. Moll of George Washington University, and Dr. Raphael Lemkin of Duke University. Their constructive criticisms have made the role of the *advocatus diaboli* in our midst a most valuable and fruitful one. And our thanks also go to all the other members of the Seminar who have participated in the discussions.

When this Seminar was founded in 1929, upon the completion and in commemoration of the guest lectures of Salvatore Riccobono, its object was defined as "the study and dissemination of the knowledge of Roman Law." Studies in Roman Law have remained, and always will remain, the central field of interest of our society which has derived its name from the great Italian Romanist who will be eighty years old next year. Yet historical phenomena are never isolated, suspended as it were in a vacuum, but always connected, through their causes, correlations and effects, with the universal texture of human history. Thus, from Roman Law, if it is taken not only abstractly,

as *ratio scripta,* but as it grew and changed; as it shaped the legal life not only of the City, but of the Empire; as it became a legacy of Antiquity to the Middle Ages both in the East and the West, dimly remembered through the dark centuries, renascent in the schools of the twelfth century; instrumental in the shaping of the classical law of the Church, and of so many legal systems or legal thought, directly or indirectly, in the growing national states at the threshold of modern times; object of critical historical investigation since the days of Humanism, and still powerful in its substance in forming the mind of the Pandectists of the nineteenth century—thus, I say, from Roman law so many roads lead, and invite the scholar into other departments of historical and juridical research, that our patron and *magister ad vitam* would certainly welcome himself the development which the Seminar has gradually taken all these years by drawing into its orbit the broad framework of ancient and medieval legal history, and the history of both the influence and the interpretation of Roman Law.

This broadening is reflected in the choice of topics treated by the various speakers during the past academic year. Of the eight conferences we heard, five were devoted to the Law of Antiquity, three to the Middle Ages and the early modern epoch. In the first group, we had two conferences concerned with Roman Law strictly speaking: one with Roman public law, when Dr. Whitney read, on October 26, a paper on the evolution of the Roman Senate, in its juridical, political and sociological functions. Roman Private Law was represented in the lecture we heard tonight on correality by Dr. Thayer. Three papers studied problems of Roman Law as a part of Ancient Legal History. Dr. Dorsey, in two lectures, delivered on December 14 and April 22, respectively, presented comparative studies on adoption and on the status of women in the legal and social systems of Asia, of the Mediterranean world and of the Indogermanic peoples, describing in particular the Roman Legal History of these institutes and the manner in which Roman Law fitted in the broad picture of what we may call Ethnological Jurisprudence. Dr. Taubenschlag, on March 29, read the introductory chapter of his forthcoming book on Roman Law in Egypt, describing the complicated stratification and amalgamation of Egyptian, Hellenic-Ptolemaic and Roman Law in this province of the Roman Empire, with unique mastership and from the background of outstanding experience in this field and particularly in juridical Papyrology which the exiled Polish scholar has acquired in forty years of preparing his great book.

Of the three conferences concerned with the Middle Ages, one dealt with the Byzantine East, and two with the influence of Roman Law in Western Legal History. Dr. Alexander, on February 24, analyzed the chartularies of two Byzantine monasteries of the thirteenth century, describing the historical and political background of the correspondence, documents and deeds contained therein, and told us what knowledge we may draw from them with reference to legal transactions in medieval Byzantium. Dr. Sereni, on November 23, summarized his findings on the beginnings of the science of International Law, from the Glossators to Grotius—findings which form part of a book on the Medieval History of International Law on which he is working—and showed the great influence which Roman Law, and particularly concepts

of Roman private law have had, by way of analogous application, on the evolution of the doctrines of International Law. The problem of "Reception" of Roman Law in medieval Poland was the topic of Dr. Gsovski's lecture, delivered on January 28, in which, after a brief review of the channels through which elements of Roman Law penetrated in Poland, he studied the attitude of later Polish scholars, from the sixteenth to the eighteenth century, toward the role of Roman Law in their own legal history, and described the political and national factors which frequently obscured the study of the sources and made the issue, Roman vs. Polish Law, rather a political one.

These, then, were the eight topics treated and discussed in our meetings. I have to make, however, mention of three additional papers which were offered to the Seminar this year but which, due to the limited number of conferences in our annual *calendarium*, unfortunately could not be read. Let me cite in the first place the paper by Professor Ernst Levy of the University of Washington, Seattle, formerly of Heidelberg, Germany, on *captivus redemptus*. As you know, Professor Levy was scheduled to speak at the April meeting but fell seriously ill. Because of the brief space of time from that second-last meeting to the final one tonight, it was not possible to postpone his lecture; we had to keep the date and Dr. Dorsey kindly obliged us by volunteering to read instead a communication of his own which I cited before. Professor Levy is still sick today, and to our common and deep regret his illness has deprived us of the opportunity to profit by the presence of a scholar in our city whom we all know for his outstanding achievements in both the interpretation and the source-history of Roman Law, and for his merits as former editor of one of the leading European periodicals in Legal History. On behalf of the Seminar I extend to him *in absentia* our best wishes for his recovery, and I hope that we shall have the opportunity to greet him in our midst when he will travel eastward again. I am glad, however, to announce that his study on the legal status of Roman citizens captured in war and later ransomed from the enemy will appear in the July number of *Classical Philology*.

The two other papers which could not be read this year, were sent by two absent members, Professor Buckland of the University of Cambridge, England, and Professor Rabel of the University of Michigan, Ann Arbor. Professor Buckland, Nestor of the English Romanists, sent us a brief but very original and interesting study on cause of action—Roman and English. The topic, as he writes us, should have appeared in his and McNair's book, *Roman Law and Common Law*, but was overlooked at the time. The paper was written, as Buckland tells us, to provoke discussion and in particular comment from Professor Levy, some of whose positions he attacks; or to put it in his own words, "I would not go to the stake or even an ordeal for anything I have said in it, but I should like to hear Levy pulling it to pieces". Since we could not arrange for a meeting with Professor Levy present in the discussion, we refrained, in agreement with the author, from reading the paper in public.

Professor Rabel's paper is concerned with pledge, mortgage and conveyance upon trust in Roman Law and was prompted by a suggestion of the late lamented Dean Wigmore, who had published in 1941 an article in the *Illinois*

Law Review entitled, "The Pledge Mortgage Idea in Roman Law: a Revolutionary Interpretation", and had invited Professor Rabel as a well known authority in Ancient Law and in Comparative Law on Securities, to comment on it. Again, as neither of the two disputing scholars could come to one of our meetings, Rabel's paper was not read.

I am happy to say, however, that we have been able to secure the publication of both Buckland's and Rabel's learned communications, and that thus they will not be lost to our members and to Roman Law Scholars in general. As you know, in earlier years the proceedings of the Riccobono Seminar used to be printed, in condensed form, in Rome in the *Bulletino dell' Istituto di diritto romano*. After the outbreak of war this was no longer possible and we had to face the regrettable result that our activities remained of an entirely esoteric nature, owing to the fact that there exists no legal historical magazine on this continent. It is a great pleasure indeed to announce that this situation has now been remedied, at least in part. The quarterly which under the title THE JURIST is published, now in its third year, by the School of Canon Law in this University, will from now onwards bring out every year a special fifth number which will be devoted entirely to Ancient and Medieval Legal History. The faculty of Canon Law, in resolving to edit this annual special number, gratefully acknowledges a suggestion made to this effect last year by Dr. Guido Kisch when he lectured before the Riccobono Seminar on American research in medieval Legal History. This will be the first periodical in this field in America, and if it cannot compete at once with the well established periodicals of Europe, it will be, nevertheless, a beginning and a first step towards an American Review of Roman Law and Legal History. The faculty intends, also, to help by this publication the Riccobono Seminar, by printing every year at least some of the papers presented to our group. The special number will be open to separate subscription (without the four regular issues) at the cost of $1.00. It will appear for the first time early in June this year, containing the following six articles:

W. W. Buckland, "Cause of Action: Roman and English"
J. B. Thayer, "Correality in Roman Law"
A. Segrè, "Monetary Inflations in Antiquity and the Middle Ages"
E. Rabel, "Real Securities in Roman Law"
G. Kisch, "Nationalism and Race in Medieval Law"
V. Gsovski, "Roman Law and the Polish Scholars from the Late Middle Ages to the Partition of Poland."

I hope that the new publication will be eagerly welcomed everywhere and in particular by the Riccobono Seminar, to whose productions such a conspicuous place is given in the first issue.

And with this announcement, I may close my report. But before I finish let us pause for a moment in remembrance of two men who have gone from us: John Thomas Vance, Law Librarian of Congress, who died on April 13, 1943 at the age of fifty-eight, and John Henry Wigmore, Dean Emeritus, School of Law, Northwestern University, Chicago, who died on April 20, from the injuries of an automobile accident, at the age of eighty. Both men rendered,

each in his field, inestimable service to generations of American students and scholars of law.

Vance's merits in the organization and direction of the Law Library of Congress since 1924; his keen perception of the importance and his knowledge of South American Law; his endeavor to build up the heretofore neglected historical sections of the Law Library (particularly Roman and Canon Law) are well known. He held the honorary degree of LL.M. from the University of Michigan (1933), and the degree of S.J.D. from The Catholic University of America (1937).

Dr. Wigmore is known to most Jurists chiefly as the author of a fundamental treatise on Evidence and of cases on Tort. Yet his were also remarkable achievements in Comparative Law and in Legal History. I recall his studies on the old Japanese Law; on Pledge and Mortgage in Eastern, Greek, Roman and Medieval Laws; on various institutions in primitive and ancient Laws (together with Kocourek); and innumerable other writings covering a world-wide domain of comparative legal history. As late as last year he published in the *Law Quarterly Review* a remarkable study on the question whether Archbishop Lanfranc of Canterbury, the great minister of William the Conqueror, had or had not been, prior to his ecclesiastical career, a teacher of Roman Law in Pavia, and interspersed this essay with very original digressions on historical hermeneutics.

A graduate of Harvard Law School, he held honorary degrees as Doctor of Laws from not less than five Universities (University of Wisconsin 1906, Harvard 1909, Louvain 1928, Northwestern 1937 and Lyons 1939). Professor of Law (1893) and Dean (1901) of Northwestern University, he became Emeritus in 1929; he also took active part in matters of International Law, and on Committees of the League of Nations after the First World War. Not only in this country, but all over the world, he was one of the best known American Jurists, nay, a living symbol of the American Jurist.

Both outstanding men were members (and at times Presidents) of various learned and professional societies. Among these, the Riccobono Seminar to which they belonged since 1935 takes perhaps only a modest place. But their memory is dear to us, and certainly the brief enumeration of a few data of their lives to which I had needs to restrict myself tonight, is entirely inadequate to their accomplishments, their lovable personalities and the deep impression they have left, one in the quietude of the librarian's work, the other on the summits of academic life, in the minds and hearts of their fellow jurists. John Vance—John Wigmore—*requiescant in pace.*

With this homage to our dead, I lay down the office of *Magister* of the Riccobono Seminar. Dr. Brown has used highly flattering, not to say inconsiderate language with regard to me. I am not worthy of it but I have tried to do my best to make this a successful year. The Council has elected as *Magister* for the year 1943-1944 Dr. Vladimir Gsovski whom I need not introduce to you. On behalf of the Council and the entire Seminar, and with my own most cordial wishes, I extend to him congratulations on this well deserved honor.